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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 208.

NANNIE MAY WILLIAMS,

Petitioner,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States.

October Term, 1933.

NANNIE MAY WILLIAMS,
Petitioner,
v.
THE UNION CENTRAL LIFE INSURANCE COMPANY,
Respondent.

No. 208.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The petitioner's summary statement fails, partly because of omissions, and partly because of too great dispersion of facts stated, to disclose completely and clearly the essential circumstances and their chronology. We submit the following supplementary outline:

1. Policy sued on was a whole-life, level-premium policy of $10,000, issued as of age of insured on June 10, 1927 (Tr., p. 162), and requiring payment of premium, throughout life, of $449.10, on June 10th of each year (Tr., p. 83).

2. Annual premiums of June 10, 1928, and June 10, 1929, were paid in cash; that is to say, on notice advising amounts of premium and of current dividend, insured re-

mitted difference between dividend and premium (Tr., p. 159).

3. Insured carried six other policies in defendant company, and was financially unable to pay premium of June 10, 1930, on this and other policies, and accordingly obtained $848 from company on assignment of this particular policy as security (Tr., pp. 91-93), and in addition borrowed from company's Dallas agents, Lee & Lee, individually, for the purpose $1,643.63, on his note to them payable on or before December 20, 1930 (Tr., p. 154). The dividend of June 10, 1930, was used to minimize the cash payment necessary to settle the premium of $449.10 on the policy in suit (Tr., p. 159).

4. The company transmitted, and the insured received, the company's usual printed notice of approaching maturity of premium of June 10, 1931, of $449.10, and of dividend of June 10, 1931, of $74.80, requiring a cash remittance of only $374.30 (Tr., pp. 100-102, 161).

5. Insured had been unable to pay all or any portion of the note for $1,643.63 to Lee & Lee, which had been in default since December 20, 1930, and was unable to remit anything on account of the premium of June 10, 1931, now due (Tr., pp. 150, 152, 155, 159).

6. The policy allowed thirty-one days' grace in payment of premiums (Tr., p. 84, Art. 9).

7. During this thirty-one days of grace—from June 10, 1931, to July 11, 1931—the premium was not paid, and the insured remained silent; he made no request with reference to the dividend of $74.80 (Tr., pp. 159, 160). In the absence of request, the provision of the policy for automatic disposition of the dividend applied, to wit, as the respondent claims, and as the Circuit Court of Appeals

has found, payment in cash to the policyholder (Tr., p. 85, Art. 12; pp. 225, 226).

8. The cash surrender value of the policy on June 10, 1931, as specified in the policy, being the value on which all nonforfeiture benefits were based, was $910 (Tr., p. 88, Art. 23). This was the full reserve, or net, value of the policy, computed according to American Experience Table of Mortality, with interest at 3½ per cent, less a surrender charge of only $60, whereas statutes permitted the deduction of a surrender charge of $250 (Tr., p. 86, Arts. 15, 16). The value of $910, less the indebtedness of $898.88, including interest, left $11.12 (Tr., p. 159), which was insufficient to cover the cost of term insurance of the coverage during the days of grace (Tr., p. 88, Art. 23).

9. On July 11, 1931, as the respondent claims, and as the Circuit Court of Appeals has found, the rights of the parties became fixed. The insurance ceased and the former insured became entitled to the payment in cash of the current dividend of $74.80 (Tr., pp. 84, 85, 159, 223, 226).

10. The company in due course transmitted to its Dallas agents, Lee & Lee, on September 9, 1931, its check in favor of the former insured for an amount which included the dividend of $74.80 on the policy in suit, as well as dividends on other policies (Tr., p. 159).

11. Lee & Lee returned the check to the company on September 14, 1931, with statement that they purposed suing the former insured on his note of $1,643.63, in default since December 20, 1930, and garnishing the sum due him by the company (Tr., p. 96). But, before bringing suit, the agents sent a representative to San Angelo to discuss the matter with the former insured, and, as a result of the discussion, the former insured executed an order

referring to the policy in suit and other policies as having lapsed, and directing the company to pay Lee & Lee the amount of specified dividends thereon, including the dividend of $74.80 on the policy in suit, and executed new note for $914.77, the balance of the old note after the application of the dividends (Tr., pp. 149-151, 155, 98).

12. The company received such written order of the former insured, and remitted to Lee & Lee in due course, on September 28, 1933, its check for the dividends specified, including the dividend of $74.80 on the policy in suit (Tr., pp. 160, 164, 165).

13. On October 7, 1931, the company in due course, but without any requirement of policy, sent formal notice to the former insured of complete termination of his insurance (Tr., pp. 160, 165, 166). This notice duly reached the address of the former insured, but a member of his family testified that the same remained unopened until after his death (Tr., p. 179).

14. The former insured died October 15, 1931, having been ill since August 16, 1931 (Tr., pp. 102, 103).

15. Aside from the foregoing, the petitioner claims that two communications in the record, both dated after July 11, 1931, when the rights of the parties became fixed, have some pertinency:

> First. A memorandum of figures sent by the company under date of July 15, 1931, to Lee & Lee (Tr., pp. 175-178), having relation to some plan to restore and permit the carrying of $15,000 of insurance (but not the policy in suit) and of using to that end all sums to which the former insured was entitled, including the dividend on the policy in suit. There is no evidence that this memorandum was ever communicated or exhibited to the former insured. The

Circuit Court of Appeals correctly said of this paper: "This statement, sent with statements of the other policies whose surrender was to free the $15,000 policy, was only a suggestion of what could be done, not a declaration of what had been done" (Tr., p. 227).

Second. A letter by Lee & Lee to the company on September 14, 1931 (mentioned in paragraph 11 above), returning the company's original remittance for dividends, and stating that they purposed suing the former insured and garnishing the sum represented by the check, and explaining that about September 1st their local agent at San Angelo had succeeded in getting in touch with Mr. Williams, and that "Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was going to have every nickel applied towards paying these policies as far as it would carry them." This had reference to the above-mentioned plan to obtain all sums to which the former insured was entitled, including the dividend on the policy in suit, and to use the same in restoring and carrying $15,000 of insurance (not the policy in suit, and not as term insurance, but by paying the regular premiums on the restored policy), and perhaps also of making some partial payment on the note to Lee & Lee for $1,643.63. The Circuit Court of Appeals correctly said of this expression: "There were seven policies involved. This statement was too indefinite to serve as a direction to apply this dividend in any particular way. Moreover, it was too late for him to apply it to extend this policy, for it had become void on July 11th, and would only be reinstated on payment of the premium with interest and satisfactory medical examination, and Williams since August 16 had been an ill man" (Tr., pp. 227, 228).

The petitioner's brief is in two parts.

The first part is the brief proper, and is bound with the petition for writ of certiorari. The argument in it is distributed among six points, lettered A, B, C, D, E and F.

The second part is bound separately as the "Supplemental Brief of Petitioner." The argument in it is distributed among three points, numbered 1, 2 and 3.

The respondent will discuss all the points separately in the order indicated above.

References to the petitioner's brief in the respondent's discussion of Points A to F will refer to pages of the petition for writ of certiorari and accompanying brief; whereas, references in the discussion of Points 1, 2 and 3 will be to pages of the petitioner's supplemental brief aforesaid.

REPLY TO PETITIONER'S POINTS A TO F.

POINT A.

The 1931 dividend was not a part of any contractual value to be applied to the purchase of term (or extended) insurance. On the contrary, the company's contractual obligation with reference to the dividend of $74.80, of June 10, 1931, was to pay the same in cash to the policyholder.

The contention of the petitioner in this case under this and other points of her argument involves a misinterpretation of numerous insurance terms. These terms are of definite meaning, and are accurately used in policy and statute. Obviously, any misinterpretation of these terms is of serious consequence. Hence, the respondent, in its brief in the Circuit Court of Appeals, discussed at some length the provisions of contract and statute and certain well-understood principles of insurance. That discussion is reproduced here for whatever use it may serve.

But, before beginning that reproduction, we desire to set forth a brief outline of the argument of the petitioner under this point, as contained in her brief, and to make some comment on the same, in the hope that the convenience of the Court may be promoted thereby.

Outline of Petitioner's Argument.	*Respondent's Comment.*
[pp. 21-22] One sentence of article 8 is in conflict with one sentence of article 12.	No conflict whatever between these two sentences. First sentence does not mention or concern dividends.

Outline of Petitioner's Argument.	*Respondent's Comment.*
	On contrary, it refers for its own specific interpretation to article 16, where are set forth the details of the application of surrender value, not of dividends. Dividends are separately and specifically covered by articles 11 and 12.
[pp. 22-27] Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, and Harvey v. The Union Central Life Ins. Co., 45 Fed. (2d) 78.	These cases fully considered hereinafter.
[pp. 27-30] 1931 premium notice operated to make the 1931 dividend a part of the policy value or surrender value.	This premium notice does not purport to alter contract, and is not basis of either allegation or proof of misleading. It is merely usual printed notice that premium of $449.10 is due June 10, 1931, that current dividend of $74.80, if used to reduce the premium payment, will leave an amount of net remittance required of $374.30. Notice refers to policy for ascertainment of rights of parties. Differences between 1928-1929 and 1931 dividend notices merely differences in printed form. Petitioners' claim (p. 29) "that at some time between the year 1929 and June, 1931,

Outline of Petitioner's Argument.	*Respondent's Comment.*
	defendant in some manner learned that the insured wanted all dividends applied to the purchase of insurance," is contrary to undisputed evidence (Tr., pp. 160, 159).
[pp. 30-40] Actuary's memorandum of figures of July 15, 1931, makes 1931 dividend a part of the surrender value.	This is same memorandum referred to in section 15, on page 4, ante. Manifestly, it is of no significance in determining the rights of the parties.

The contractual obligation with reference to the dividend of $74.80 of June 10, 1931, is expressed in the policy as follows:

> "In the event * * * the policy shall lapse, the dividend then due shall be paid in cash" (Tr., p. 85, Art. 12).

The stipulation is contained in an article devoted to provisions for the automatic disposition of dividends. Such article follows another devoted to options open to the policyholder, for his choice, regarding the disposition of dividends.

Such "Dividend Options" article (so headed in the policy itself) follows with such explanatory matter as is deemed proper (Tr., p. 85):

"11. Dividend Options.	**Explanatory Matter.**
[1] Dividends may be withdrawn in cash;	

11. Dividend Options.	Explanatory Matter.
[2] or applied to the payment of premiums;	Each previous dividend had been so applied, in connection with cash payment to the company of the balance of the premium. The dividend of $74.80 was insufficient to pay the annual premium of $149.10. The policy provided for acceptance of nothing less than an annual premium; but the company would have accepted as little as a quarterly premium, had request for change of policy in this respect been made. But the dividend was insufficient for payment even of a quarterly premium. Hence, such method was unavailable.
[3] or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time;	No such request ever had been made. No dividend had ever been left with company.
[4] or applied to the purchase of paid-up participating additions to the policy,	No such request ever had been made. No dividend had ever been so applied. The "paid-up participating additions to the policy" thus purchased with dividends are, and always have

11. Dividend Options.

[5] convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger,

[6] but payment may be deferred by the company ninety days from the date of application therefor."

Explanatory Matter.

been, known in the business as "dividend additions," or "paid up additions."

The company, of course, carries a reserve against such dividend additions, as well as against the policy proper, and such "dividend additions" may be surrendered for, or converted at any time into, cash for the amount of the dividend, or of the reserve, if larger than the dividend (the reserve being equal to the amount of the dividend plus interest but less mortality cost).

It will be observed that there is here no option in the policyholder to request, and no promise by the company to grant, as a substitute for the dividend, any term insurance in favor of the policyholder's estate, or of the policyholder's beneficiary, or, indeed, of anyone.

Further, it will be observed that any option must be exercised before any provision for automatic disposition becomes applicable under the next succeeding article. In other words, such option must be exercised at least within the thirty-one days of grace after premium maturity. The dividend becomes available at premium maturity, and either the policyholder's selected option of disposition or

the automatic disposition is put into effect by the end of the grace period.

The "Automatic Disposition" article (also thus termed in the policy) follows, with similar explanatory matter (Tr., p. 85):

"12. Automatic Disposition.	**Explanatory Matter.**
[1] On payment of the premium	But the premium was not paid. Hence this was inapplicable.
[2] or on the policy anniversary if no further premium is payable, if no other option has been elected,	But further premiums were payable under the policy; that is, it had not become paid up, as, for instance, a 20 payment life policy is paid up at the end of 20 years. Hence this was inapplicable.
[3] the dividend then due shall be applied to the purchase of paid up additions.	
[4] In the event	
[5] of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected,	But the insured did not die during the days of grace. Hence this was inapplicable.
[6] **or if the policy shall lapse.**	**The policy did lapse and this automatic provision became applicable.**
[7] **the dividend then due shall be paid in cash.**	**The dividends became payable in cash.**
[8] At the death of the in-	But death did not occur

12. Automatic Disposition.	Explanatory Matter.
sured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."	during the continuance of the policy. Hence this provision was inapplicable.

Also, as usual, the policy provides that in the event of nonpayment of a premium, the surrender value of the policy may be applied in any one of various ways, at the option of the policyholder, and that if no option be exercised by the policyholder the surrender value shall be automatically applied by the company in a particular manner.

The policy specifies the exact amount in figures of the cash surrender value at the end of each of various years. The amount so specified for June 10, 1931, is $910.00 (Tr., p. 88). This cash surrender value constituted the full reserve under the policy, computed, as specified therein, on the American Experience Table of Mortality, with interest at the rate of 3½ per cent, less a surrender charge of $60.00 (Tr., pp. 174, 86, Arts. 14, 15).

A statute of Texas (R. S., Art. 4732), similar in terms to statutes of numerous other states, requires that policies of life insurance issued in Texas shall contain a provision whereby the insurer shall stipulate for the payment to the insured, or for the application to the purchase of some form of insurance, upon the occasion of a premium default, of the reserve on the policy, less a certain surrender charge; but the permitted surrender charge is 2½ per cent of the face amount of the insurance, or, in this case, 2½ per cent of $10,000.00, or $250.00. Hence, the provisions of the policy in question are more favorable to the policy-

holder than the statute of Texas requires, in that the cash surrender value promised by the company is $910.00, whereas a figure of $720.00 ($970.00 less $250.00) would have satisfied the Texas statute.

The policy extends to the policyholder three options, labeled Options 1, 2 and 3, for the use of the surrender value. They are declared to be all of equal value. It is specified that: "If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1" (Tr., p. 86, Art. 16).

It is stated that such options are granted "provided there be no indebtedness or advances on the policy" (Tr., p. 86, Art. 16).

But, further, it is stipulated that "if there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid up value shall be reduced proportionately, and the extended insurance shall be for the face value of the policy, less the indebtedness and advances and for such term as said reduced cash value will provide" (Tr., p. 88, Art. 22).

The options, together with such explanatory matter as is deemed proper, follow (Tr., pp. 87-88):

"17. Option 1—Extended Insurance.

[1] Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1).

Explanatory Matter.

The cash surrender value specified for June 10, 1931, was $910. Had there been no indebtedness against the policy, this $910, if this option had been exercised, or, indeed, if no option had been exercised, because Op-

17. Option 1—Extended Insurance.

Explanatory Matter.

tion 1, in that event, was automatic, would have been used to purchase Participating Term Insurance from the company. This is a form of insurance different from and cheaper than Ordinary Life Insurance, which was the type covered by the policy. The $910 cash surrender value would have been sufficient to provide $10,000 of "Participating Term Insurance," according to the table in the policy, for 4 years 330 days, or 1,790 days, and at that rate each day's insurance would have cost $910 divided by 1,790, or between 50 and 51 cents, whereas the type of insurance granted by the policy at $449.10 per year of 365 days, cost $469.10 divided by 365, or $1.29 per day. By the terms of the above quoted provision, applicable in case of indebtedness, the indebtedness then amounting to $898.88 was deductible from the cash surrender value of $910, leaving $11.12, and such $11.12 was applicable to the purchase of extended

17. Option 1—Extended Insurance.

[2] The value of any paid up additions will be used to increase the term of extension.

Explanatory Matter.

insurance for $10,000 (less $898.88) at the rate of between 50 and 51 cents per day for $10,000 of insurance. Such sum would have purchased only 22 days' insurance, and the extension would date from June 10, 1931, and hence the sum available would not even cover the cost of the 31 days of grace after the premium maturity.

Had there been any "paid up additions" to the policy purchased with dividends under the terms of the 4th dividend option under Article 11, hereinbefore copied, the value of such additions, or which is the same thing the reserve held by the company against such "paid-up additions," would be likewise applied to the purchase of "Participating Term Insurance," increasing or lengthening the term of such insurance. Here there were no paid-up additions. However, the contention of the plaintiff is that the dividend of June 10, 1931, should be treated as if it were a paid-up addition.

17. Option 1 Extended - Insurance.

[3] Accumulations of dividends at interest may be applied to increase the term of extension.

Explanatory Matter.

This provision is applicable to the third dividend option under Article 11, hereinbefore copied. If the policyholder had selected this third dividend option and had left a prior dividend "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," as specified in such option, then such "accumulations of dividends at interest" would also be applied to the purchase of "Participating Term Insurance" and would lengthen the term of such insurance. Here the policyholder had made no selection of the third dividend option, and had left no dividend with the company to accumulate with interest under the terms of the option. However, the plaintiff contends that the dividend of June 10, 1931, should be treated as if it had been left with the company to accumulate under the terms of such option,

17. Option 1—Extended Insurance.

[4] Dividends on extended insurance shall be paid in cash and only for completed policy years."

Explanatory Matter.

even though in the same breath the plaintiff claims that instead of being left with the company to accumulate at interest, it should be immediately used by the company in the purchase of participating term insurance.

The insurance purchasable under Option 1, it will be observed, is designated as "Participating Term Insurance." The appellation "Participating" indicates that such insurance will share in dividends. Hence, some dividends will be payable on such participating term insurance. This provision is a stipulation that such dividends shall be paid in cash. They shall not be used in the purchase of further participating term insurance, which would increase or lengthen the term of such insurance. In other words, they are payable in cash, just as is the dividend of June 10, 1931, under the terms of the provision applicable thereto, hereinbefore copied.

The foregoing article contains the only expressions upon which the petitioner has heretofore based any contentions in this case, these expressions being contained in subdivisions [2] and [3] of the article, as above copied.

However, for the information of the Court, it may be desirable to set forth, in the same manner as above, the provisions of articles 18, 19 and 20 constituting other options open to the policyholder for the use of the cash surrender value. Such provisions will indicate the choices that were open to the policyholder, and the recurrence therein of the expressions "Paid up additions," "Accumulations of dividends at interest," and of "Dividends * * * shall be paid in cash," will illustrate the identity of the meaning of these expressions in all instances and will throw light upon the commonness of their use and of the understanding of their significance in insurance contracts.

"18. Option 2 Paid up Insurance.

[1] Applied to the purchase of paid up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2).

Explanatory Matter.

If the policyholder had selected this option and there were no indebtedness against the policy, the $910, according to the policy, would purchase paid-up participating insurance of $1,600. This means that the policy would have been paid up for life for $1,600. In other words, each dollar would purchase paid-up insurance for $1,600 divided by $910, or $1.58. The effect of the provision with reference to indebtedness against the policy would have been, had

18. Option 2—Paid-up Insurance.

Explanatory Matter.

this option been selected by the policyholder, that the indebtedness, $898.88, would have been deductible from the cash surrender value of $910, and the difference of $11.12 would be applied to the purchase of paid-up insurance, and the same would have purchased $17.57 of paid-up insurance.

[2] Any paid-up additions will be added to the amount of the paid-up insurance.

Paid-up additions to the policy, had any been purchased with dividends in pursuance of the fourth option under Article 11, hereinbefore copied, would have been of precisely the same character as the paid-up participating insurance purchasable with the cash surrender value under this option, and the face amount of such paid-up additions would have been added to the face amount of the paid-up participating insurance purchased with the cash surrender value. But here, of course, there were no paid-up additions, and no paid-up participating insurance, and no option exercised to apply the $11.12 of remaining cash surrender

18. Option 2—Paid-up Insurance.

[3] Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insurance shall not exceed the face amount of the policy.

[4] Dividends on paid-up insurance shall be paid in cash."

Explanatory Matter.

value to the purchase of paid-up insurance.

Had the policyholder selected the third option under Article 11, hereinbefore copied, and left some former dividend with the company "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," then under this provision such accumulation of dividends at interest would be applied to purchase additional paid-up insurance, provided, however, that the total amount of paid-up insurance should not exceed the face amount of the policy.

This provision is similar to the provision last appearing in Article 17, above quoted. The "paid-up participating insurance," it will be observed, is "participating"—that is to say, it shares in the dividends—hence dividends will be payable thereon. Such dividends under this provision are to

18. Option 2—Paid-up Insurance.

Explanatory Matter.

be paid in cash and are not to be applied to the further purchase of paid-up participating insurance.

"19. Option 3—Loan.

[1] Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per cent interest, payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon, with interest, shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

[2] The loan value will

Here, again, if the policy-

19. Option 3—Loan.

be increased by the value of any paid-up additions.

[3] The loan value, less interest to next anniversary, is available at any time during the policy year if premiums have been paid to the end of the year. Consummation of loans other than paid-up premiums on loans in this Company may be deferred by the Company ninety days from the date of the application therefor."

"20. Option 4—Cash.

[1] Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4).

[2] The cash value will be increased by the value of any paid-up additions.

Explanatory Matter.

holder had selected the fourth option under Article 11 and caused some former dividend to be applied to the purchase of paid-up additions to the insurance, then the loan value would be increased by the value of the paid-up additions; or, which is the same thing, the reserve carried by the company against these paid-up additions.

Here, again, if the policyholder had selected the fourth option under Article

20. Option 4—Cash.

Explanatory Matter.

11, hereinabove quoted, and had caused some prior dividend to be applied to the purchase of paid-up additions to the policy, the cash value available on surrender of the policy would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against such paid-up additions.

[3] Payment may be deferred by the Company ninety days from the date of application therefor."

The Court will have observed the repetition of the expressions "Paid-up additions," "Accumulations of dividends at interest" and "Dividends * * * shall be paid in cash" in the quoted articles. These expressions are repeated in subdivisions of the articles as follows:

"Paid-up additions."

Art. 11, sub. 4
Art. 12, sub. 3
Art. 17, sub. 2
Art. 18, sub. 1, 2
Art. 19, sub. 2
Art. 20, sub. 2

"Accumulations of dividends at interest."

Art. 11, sub. 3
Art. 17, sub. 3
Art. 18, sub. 3

"Dividends * * * shall be paid in cash."

Art. 11, sub. 1
Art. 12, sub. 7
Art. 17, sub. 4
Art. 18, sub. 4
Art. 20, sub. 1

The expressions "Dividends * * * shall be paid in cash" and "Accumulations of dividends at interest" seem to us nontechnical and involving no possibility of doubt concerning their proper interpretation.

The terms "Paid-up additions" and "Dividend additions" are technical terms. They have a perfectly definite and well-understood meaning in the insurance business, and because the plaintiff, by her pleadings, contended that the dividend of June 10, 1931, was, or should be treated as, a "Paid-up addition" or "Dividend addition," the defendant deemed it proper to introduce evidence concerning the meaning of these terms in the insurance business. One of the witnesses was an actuary for the defendant company; the other was the actuary for the Southwestern Life Insurance Company, a Dallas, Texas, institution. Both testified that the terms had only one meaning, namely, the small paid-up insurance additions to the policy purchased by dividends; that the terms were commonly employed in the business; that they had never had any other than this meaning (Tr., pp. 143-145, 169). This evidence was uncontradicted.

Facts With Reference to Lapse of Policy and Actual Payment of Dividend.

The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual

dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931. The thirty-one days of grace expired without any payment, in whole or in part, and without the specification of any option of disposition of dividend or of cash surrender value (Tr., p. 160). The evidence is undisputed that the company received no such specification (Tr., p. 160).

The company, in due course, prepared its check for the dividend of $74.80, and for dividends on other policies, as well, in favor of the policyholder, and transmitted the same to its agents, Lee & Lee. Lee & Lee, however, returned the check, and, having sent their attorney to interview the policyholder with reference to the payment of the policyholder's note to them of $1,643.63, and having obtained from the policyholder an order upon the company for the payment of the dividend to them, and having, upon receipt of such order, canceled and surrendered to the policyholder the note of $1,643.63, and accepted a renewal note for the difference, transmitted the written order to the company. The order was executed by the policyholder at his own home on September 18, 1931; and the company, on September 28, 1931, transmitted its check for the dividend to Lee & Lee, which check was promptly paid.

The policyholder knew and was informed that the policy had lapsed when he executed the order of September 18, 1931; but the company, also in due course, by letter dated October 7, 1931, advised the policyholder of the fact that

the policy had become null and void, and had been canceled (Tr., pp. 165-166). This notice was duly received by the policyholder prior to his death, but, according to the testimony of his son, remained at the house unopened until after the death.

No claim of mental incompetency was asserted by the plaintiff at the time of the transaction between Lee & Lee's attorney and the policyholder on September 18, 1931, though the plaintiff was in an adjoining room. No claim of such mental incompetency was asserted by anyone until after the death of the policyholder. The company had no information of any such claim until long after this suit was brought, and then only in the form of a letter received from its counsel in charge of the suit, indicating that the plaintiff was making or intended to make such claim (Tr., p. 160).

The petitioner does not claim that the policyholder at any time prior to the expiration of the thirty-one days of grace, June 10, 1931, communicated to the company, or any agent of the company, any selection of option with reference to the disposition of the dividend of June 10, 1931, or of the small remaining balance of the cash surrender value, $11.12. The undisputed evidence is that the company received no information whatever concerning the policyholder's wishes on this subject, and the automatic provisions of the policy took effect.

The petitioner's entire claim of any expression of intention or desire on the part of the policyholder with respect to the dividend disposition, at variance with the payment of the dividend in cash to Lee & Lee, is based upon a passage in a letter from Lee & Lee to the company, dated September 14, 1931. In this letter Lee & Lee returned the

first dividend check to the company and advised the company of the personal loan that they had made to the policyholder the year previous for the purpose of enabling him to maintain his policy in force, and of their efforts since to collect this advance, and of their intention to bring suit against the policyholder and to garnish the dividends in the possession of the company if the policyholder declined to pay. The letter was written before they obtained the written order from the policyholder dated September 18, 1931. The passage which the petitioner contends constitutes some expression of the policyholder on or about the 1st of September, 1931, is as follows:

> "Our agent at San Angelo did not seem to press this matter with the proper amount of energy in seeing Mr. Williams personally until finally about the 1st of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was going to have every nickel applied towards paying these policies as far as it would carry them. In the face of this cold-blooded refusal of Mr. Williams we have had our attorney prepare papers suing Mr. Williams for the note and garnishing the company for all of these dividends" (Tr., p. 97).

But it will be noted that this recites some conversation about the 1st of September, 1931, long after the policy had lapsed, the days of grace had expired, the disposition of the dividend had become automatically fixed as payable in cash, and all time for the selection of any option had expired. Also, that it was not in terms applicable to any option granted by the contract, even had the option been properly exercised within the thirty-one days of grace, and that if application to some option be forced, the ex-

pression in the letter would most nearly fit the option for the purchase of a paid-up participating addition to the policy, specified in subdivision 4 of article 11 hereinbefore copied. This option would have entitled the policyholder to a paid-up addition of $17.57, or $1.58 of paid-up insurance for each dollar of dividend applied to the purchase. But in reality the recital evinces an intention of the policyholder to permit to remain lapsed all but a small part of his insurance, obtain in cash all moneys available under such policies, and use the same in reinstating and continuing in force some small portion of his insurance, and not using any of the cash to make good his personal promise and obligation to Lee & Lee for the $1,643.63 they had advanced for him the preceding year.

Little argument seems necessary or appropriate in the facts of this case.

The relationship between the petitioner and the respondent is purely one of contract. The respondent is not liable to the petitioner unless it has stipulated such liability.

The contract between the parties is to be fairly interpreted. It is not to be twisted or distorted, or its plain terms altered by any process of metaphysics or dialectics in order to award the petitioner a judgment.

It is to be interpreted in accordance with the reasonable intent of the parties gained from the language of the contract.

Obviously, when the company promised to distribute dividends, it was necessary that the contract provide when and how the company would distribute the same.

The business of insurance is concerned with the risk

of death. That risk in an individual case may change greatly in a single day—even in a single minute. Any choice of alternatives, involving either an increase or a termination of the risk, should be promptly made. An insurance company must be able to know the risks for which it is liable. It cannot carry transactions along in suspense, in such wise that it will be held for the risk when that is for the advantage of the policyholder and, on the other hand, will be required to return money when, as it develops, the carrying of the risk would have been for its advantage.

By the policy provisions, the dividends were made payable by the company at the same time that premiums were made payable to the company.

As the policy provisions were designed to allow to the policyholder a grace of thirty-one days in the payment of the premium, they also afforded him the same margin of time in the selection of the desired disposition of dividends.

But the thirty-one days of grace having expired, the design was that the rights of company and policyholder should become fixed with reference to dividends as well as premium default.

The parties were at liberty to agree as they pleased, no statute intervening, concerning the disposition of the dividends.

The policy provisions upon which they agreed contained many repetitions of the expression, or its equivalent, that "Dividends * * * shall be payable in cash.". These are in contrast with repeated expressions that dividends may be applied in the purchase of paid-up additions, or may be allowed to accumulate with the company at inter-

est, and with repeated other expressions that the cash surrender value may be applied to the purchase of term insurance upon premium default, or may be applied to the purchase of paid up additions. The language that "dividends * * * shall be payable in cash" is plain, everyday language. There can be no question that ordinary men would understand by such language that dividends should be paid or payable in money of the country, and not in some form of substituted insurance contract.

The policy provisions in articles 11, 12, 17, 18, 19 and 20 hereinbefore quoted indicate a careful attempt to distinguish between the payment of dividends in cash and the use of dividends to purchase some form of substituted contract from the company an attempt to specify just when the dividends may or shall be applied to the purchase of such a substituted contract, and when, on the other hand, they shall be paid in cash.

Undoubtedly, in a business as highly competitive as life insurance, such attempt at distinction and specification was designed to accord with the wishes and the interests of insurance buyers.

The automatic provision for payment of the dividend in cash, with which we are concerned in this case, is a provision applicable to the contingency that the premium has not been paid and that the policy itself has lapsed, and that the policyholder has selected no other disposition of the dividend. What fairer provision to the policyholder could there be? He has the right within the thirty-one days of grace to indicate, within the range of options allowed to him (but it will be recalled that the purchase of term insurance is not one of such options), how the dividend shall be disposed of. His omission to select some

other disposition is in itself an indication of his acceptance of, and satisfaction with, the automatic provision, namely, payment in cash.

The policyholder who voluntarily has relinquished, or who, from reduced financial circumstances, has been compelled to relinquish, a policy of insurance, may profit more from a cash payment, though small, than from a substituted insurance contract continuing for only a short time.

Especially may he so profit when, as here, he receives the dividend (Tr., p. 89, Art. 25), whereas the substituted insurance contract advantages only his beneficiary.

The policyholder has the right and the means of determining which is the better bargain for himself. His omission to select some other disposition is an indication of his decision to accept cash.

Had he desired to receive the cash and to apply it in reduction of the lien against the policy, he could have done so. He chose not to do so.

He did not owe the policy lien. It was not indebtedness. It was a mere lien. A desire to apply the dividend on such lien, in the case of a lapsed policy, would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so-called liability of the policyholder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have

> mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning**, because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

It is plain that the company has attempted, in the various instances in which the policy of the company provides that dividends shall be payable in cash, to definitely fix and establish that cash as the limit and extent of its liability. It arranges and conducts its business, reports its liability and distributes its dividends on that basis.

Any decision disrupting this business arrangement and conduct and requiring the company, in addition to the payment of the dividend in cash, also to substitute term insurance whenever, as it subsequently develops, that would be to the advantage of the policyholder, would be destructive of business stability, as well as of legal principles.

No policy provision contains any promise whatever that a dividend may be applied to the purchase of term insurance. The options were that dividends might be withdrawn in cash, or applied in payment of premiums, or applied to the purchase of paid-up additions to the policy, or left with the company to accumulate at interest until the maturity of the policy, subject to withdrawal in cash at any time. No ground exists in law or morals for requiring the company to grant as a substitute, after the

death, a contract of term insurance which shall cover the death.

No one of the options open to the policyholder was specified by him.

If the policyholder, on some prior occasion, instead of using, as he did, the dividends, had declared to the company that he would allow such dividends to accumulate with it at interest until the maturity of the policy, then any dividends accumulated under this selection of option would, under article 11 of the policy, in the event of subsequent premium default, have been usable, at the option of the policyholder, in connection with the cash surrender value, for the purchase of term insurance.

But the policyholder, instead of allowing dividends to accumulate, had used the same; he had never notified the company that he desired or would permit dividends to accumulate with it at interest until the maturity of the policy. The dividend in question became subject on June 10, 1931, to the disposition, and choice of disposition, of the policyholder, and so remained during the thirty-one days of grace, but at the expiration of that time, no disposition or choice having been made, the dividend became an obligation definitely payable in cash, and not otherwise. The petitioner's claim that it should have been immediately applied to the purchase of a term insurance contract is utterly inconsistent with any actual or authorized accumulation at interest until the maturity of the policy.

To sanction such a claim would do violence to both contract and morals.

Further, the petitioner claims that the dividend of June 10, 1931, should be treated as a "paid-up addition" to the

policy. But he points to no ordinary or everyday usage anywhere constituting a dividend a "paid-up addition." Both the word "paid-up" and the word "addition" are wholly foreign to the conception of dividend. Obviously, "paid-up addition" is a term of the insurance business, and the uncontradicted evidence leaves no doubt whatever that such term neither has, nor ever has had, any other meaning than a paid-up addition to an insurance policy purchased with a dividend the terms "paid-up addition" and "dividend addition" being synonymous.

In Gardner v. National Life Ins. Co. (1931, N. C.), 161 S. E. 308, the plaintiff contended, as here, that the company should have applied a dividend to the purchase of term insurance so as to extend a lapsed policy to a date past the death of the insured. The cash surrender value of the policy less the indebtedness left a sum of $2.31, which was applied to the purchase of term insurance, but which did not extend to the death of the policyholder. It was essential to the plaintiff's purposes that she show that some additional sum should have been applied by the company to the purchase of such term insurance. The dividend option provisions of the policy were very similar to those in the present case. The policyholder had elected at the time of applying for the insurance that the dividends should be "left with the company at interest unless otherwise ordered." One dividend had accrued and had been paid to him in cash. The second dividend accrued at the same time that premium default occurred. The company retained this dividend. The plaintiff claimed that it should have been applied to the purchase of term insurance. The policy in that case did not provide that dividends left with the company to accumulate at interest until the maturity of the policy should be usable in the purchase of term insurance.

The Court said:

"The policy provides that, unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same shall be held by the company, at interest, to be withdrawn by the insured at any time, or to be included in any cash settlement of the policy. Although he had notice of the dividend due on May 11, 1930, and of his right to direct its application to the payment on the premium due on said date, or to the purchase of extended insurance, the insured did not order such application. He elected that the dividend should remain with the defendant, at interest, in accordance with his direction given in his application for the policy. In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to May 11, 1930, and due at said date, as a payment on the semiannual premium due on May 11, 1930, or to the purchase of extended insurance. If in violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would have, nevertheless, been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff, because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

In Hutchinson v. National Life Ins. Co. (1917, Mo. App.), 195 S. W. 66, it was contended that a dividend should have been applied in some way for the purchase

of term insurance. The "net value" or "reserve" of the policy was usable for the purchase of term insurance, and it was contended, first, that the dividend was a part of the net value, and, this failing, it was contended that, anyhow, on some ground, the dividend should have been used by the company to purchase term insurance. The Court said:

"This brings us to the final claim that the dividend should be considered as a part of the net value of the policy. The 'net value' at a given time was shown at the trial to be the 'reserve.' This is conceded, and it is the view adopted by the authorities (Rose v. Insurance Co., 153 Mo. App. 90, 132 S. W. 613; Fable v. Insurance Co., 155 Mo. App. 15, 134 S. W. 60). The statute enacts the process whereby the net value is ascertained and does not include an unpaid dividend. On the other hand, the contract in the policy is that the unpaid dividend is to be applied in part payment of the next annual premium.

"Running through the argument for plaintiff there is to be found a confusion of statement as to the application of the dividend of $19.12, declared by defendant on the 31st of December, 1913. First is the insistence that it should be applied to the payment of the premium, then follows an assumption that the dividend, thus applied, bought extended insurance. We think that does not follow. The two things are wholly disconnected and distinct matters. A sum which is to be used in payment of premiums becomes a part of the premium fund, and pays, or helps to pay, the premium which buys the regular insurance, and furnishes no part of the fund which purchases extended insurance, except as it may do so indirectly by forming a part of the reserve. The fund which buys the latter insurance is provided by law, and is ascertained after the manner pointed out in the statute; while the former is provided for by the con-

tract, and contemplates a continued live contract. The latter is attached by law to prolong the life of a contract which, if left to its own terms, would be ended by forfeiture. Plaintiff truly says, at page 10 of the brief in her behalf, that 'the policy provided that the dividend of $19.12 should be applied as a credit on the premium.' But it is immediately added that this, at the rate per day, 'carried the insurance 118 days,' a period long beyond the date of deceased's death. The policy does provide that:

"'Dividends assigned by the company shall be applied to the reduction of each subsequent year's premium, or if the insured prefer to pay any premium or premiums in full, the dividend or dividends will be applied to the purchase of paid-up additions to the policy.'

"But, as deceased did not pay his premium due in May, 1914, this dividend of $19.12, declared the previous December, was automatically credited on that premium, reducing it from $85.75 to $66.63, but still leaving the default. The fact that it was for a less amount does not destroy its force as a forfeiture.

"Plaintiff seeks to deal with this dividend as a separate and distinct payment of a premium for the purchase of extended insurance, carrying the life of the policy beyond the death of the insured. This would not be within the law, and would be outside the terms of the contract, for, as we have seen, it must be merely credited on the annual premium falling due next after the dividend is declared. But there is a provision in the policy that premiums may be paid annually, semi-annually, or quarterly, and it may be suggested that the dividend would apply as far as it would go as a quarterly payment. But the same answer could be made to this as has just been made to a full annual payment. The dividend was not sufficient to cover a quarterly payment, and if, without request from the assured, defendant had credited it as a quarterly

payment, it would still have left a default. If a quarterly payment was intended to be made, it, of course, should have been for a full quarter. The defendant could not be required to accept less (Terry v. Ins. Co., 90 S. C. 1, 72 S. E. 498).

"The fact that the lawmakers, in legislating on the subject of extended insurance, have failed to provide in terms that upon default in payment of premiums, when there were dividends declared but not paid or applied, the amount of such dividends should be used in the purchase of extended insurance, is apparently conclusive that it was not intended that they should be used for that purpose. The contract provides for only two uses of unpaid dividends, one as a credit on the next annual premium, and the other to purchase of additional insurance if the insured paid the annual premium in full; and we have seen that, as the insured did not pay the premium, the dividend could only be applied as a credit thereon."

In the case of Atlantic Life Insurance Company v. Bender (1926, Va.), 131 S. E. 806, dividend options were the same as those provided for in the policy involved in suit, but the dividends, under an automatic provision, had been applied to the purchase of paid-up additions to the policy. The policy lapsed upon the nonpayment of a premium, and after the death of the insured it was contended that the company should have used the dividends toward the purchase of term insurance. The Court held:

"This position is not tenable; the dividends had been applied according to the terms of the policies. * * *

"* * * Dividends and cash or loan values of life insurance policies do not belong to insurance unless created by statute or granted by the policies, and in

the latter instance **subject to the terms and conditions contained therein.''**

In Toncich v. Home Life Ins. Co. (1932, Pa.), 163 Atl. 673, a payment of $11.40 was due to the policyholder which, under the terms of the policy, might be applied in any one of various ways. But the purchase of term insurance was not one of such methods. The plaintiff claimed that nevertheless the sum should have been applied by the company to the purchase or provision of term insurance.

The Court said:

''On April 28, 1929, there was due a guaranteed coupon for $11.40 by virtue of a supplemental agreement as follows: 'On the second and each subsequent anniversary date of the policy, provided it be then in force, there will become due and payable in cash a coupon for the amount shown below. The insured, however, may select any one of the three following options: 1. To apply the coupon towards paying the premium then due, by surrendering it and paying in cash the full premium less the coupon.' The two remaining options are not material to this issue. Plaintiff argues that this $11.40 should have been applied by the company towards a further extension of the policy. The statement of claim contains no averment that insured made any effort to have the coupon so applied. In the absence of any indication by the holder of what should be done, and in view of the four possible dispositions of the coupon, it is difficult to see how appellant can now claim that the coupon had the effect of extending the insurance.''

Well-Understood Principles of Life Insurance.

While it seems to us unnecessary, yet for the possible convenience of the Court, particularly in the study of some cases which the petitioner has cited, it may be well to review briefly some of the well-understood principles of the life insurance business.

It is well known that insurance computations are based on mortality tables.

There are two such tables commonly used, namely, the American Experience Table of Mortality and the Actuaries' or Combined Experience Table of Mortality.

These tables do not differ greatly.

Each table, starting with approximately 100,000 lives at age 10, indicates how many die each year. According to each table, all die before age 100. The last three die at age 95, according to the first table, and the last one at age 99 according to the second table.

It is also well known that all computations are likewise based on an assumed rate of interest, such rate being now generally 3½ per cent.

In order that there may be common basis for calculations, American practice assumes that premiums are received at the beginning of the year, and that deaths occur at the end of the year.

Hence, given the exact dates when deaths will occur, and when premiums will be paid, and the exact interest return that will be regularly received and annually compounded, each dollar being immediately invested and kept invested until disbursed on account of death, and disregarding expenses and losses and all contingencies, it is

a simple mathematical problem to compute to the penny the amount of premiums that must be paid in order to meet the deaths as they occur.

These mathematically exact and requisite premiums are called "net premiums."

But as some additional charge is essential for expenses, a "loading" is placed on the net premium, and the sum constitutes the "gross premium."

It is well known that as the individual advances in age, the chance that he may die within the next twelve months increases each year. The mortality cost of insurance increases with each added year of age.

If the individual were charged each year a premium exactly sufficient, neither more nor less, to defray the mortality cost of his insurance for such year, the amount of the premium would increase from year to year.

But, as it has been found practically necessary or desirable that premiums be not thus increased from year to year, but be fixed at a level figure, it necessarily follows that this level figure must be greater than the mortality cost during the early years of the insurance, and less than the mortality cost during the later years of the insurance, the excess portions during the early years compensating for the deficits in the later years.

Hence, upon every level premium policy, the excess portions or savings, from premiums and interest, accumulate from the beginning.

If still, regardless of the insurer's actual experience with mortality cost and return on investments and expenses, it be assumed that deaths have occurred just as pointed out by the mortality table and that premiums have been

continuously invested at the assumed rate of interest, it is, as before, a mere mathematical problem to compute the accumulated savings, per $1,000 of insurance, at any date that may be desired.

The sums thus mathematically computed for $1,000 of insurance constitute the amount of the insurer's "reserve" against such policies.

The insurer is required by law, as a test of its solvency, to maintain such reserve. If its experience has been less favorable than the required standard of table of mortality and assumed rate of interest, the difference constitutes a loss in operation. If its experience has been more favorable than the required standard, the difference is a profit from operation, which may be distributed in the form of dividends.

These "reserve" amounts constitute that which has been paid in excess of the requirements of the assumed table of mortality and rate of interest, and thus represent to the policyholders the value of their policies.

In addition, the difference between the present worth, according to the table of mortality and the assumed rate of interest of all the premiums yet to be paid by a policyholder under his existing policy, and the present worth, similarly computed, of the premiums which he would have to pay on a new policy of the same type at his increased attained age, is exactly the amount of this "reserve."

The terms "reserve" and "value" or "net value" as applied to a policy are interchangeable. They designate precisely the same amounts.

As a test of its solvency, a life insurance company must

have on hand the amount of the "reserve" against its outstanding policies, or the "net value" of its outstanding policies, computed in accordance with the table of mortality and assumed rate of interest which it uses, or which has been adopted as a standard by statute.

In its statement of assets and liabilities, a life insurance company charges itself with a liability equivalent to the "reserve" against, or the "net value" of, its outstanding policies.

The loan values and cash surrender values of policies are fixed with reference to such "reserves" or "net values."

They are within the amount of the reserves or net values, but usually constitute the reserves or net values less a surrender charge varying in amount.

The surrender charge is made for the trouble of the transaction, and, also, for the injury to the company, by way of adverse selection of risks, involved in the surrender, it being thought that, as a general rule, only the good lives surrender their policies, whereas the impaired risks are certain to continue their policies in force to the end.

An insurance company may be able to invest its funds so as to yield more than the assumed rate of interest; also, it may select its policyholders in suchwise as to effect a mortality cost less than that of the assumed table of mortality. In each case the company makes a profit.

Also, it may effect a saving in expenses from the "loading" added to the net premium. Such savings augment its profit account.

From this profit account it declares dividends.

Thus, reserves and net values are entirely separate and distinct from dividends, and vice versa.

At intervals in the history of insurance, some one or more companies, particularly small companies desirous of "window-dressing" their policies to make them seem more attractive to the buyers, have issued policies containing provisions for the payment of "guaranteed dividends." These so-called "guaranteed dividends," sometimes represented by coupons, sometimes covered by a provision in the policy, are, in fact, misnomers. They are definite obligations for the payment of specific sums of money; and corresponding charges for them necessarily enter into the make-up of net premiums on the policies. For such obligations, as well as for the obligations to pay sums at death, the mathematically exact "net premiums" chargeable for the same, according to the adopted table of mortality and assumed rate of interest, of course may be computed, and, likewise, the "net value" or "reserve," as of any date, against such obligations. Both statute and company practice require the maintenance, as a test of solvency, at all times, of such "net value" or "reserve" against such contracts.

There are several well-known forms or types of insurance policies.

The first is the ordinary life type, which provides for the payment of premiums annually throughout life and for the face of the policy payable upon death.

Second, there is a limited payment type, which provides for the face of the policy to be payable at death, but for the payment of premiums for only a limited number of years, for instance, for five years, ten years, fifteen years, twenty years; such policies being commonly known as

five-pay policies, ten-pay policies, fifteen-pay policies, twenty-pay policies.

A third type of contract is the endowment type, which provides for the face of the policy to be payable at death, but also provides for the face of the policy to be payable at the end of a specified period of years, if this precedes death. Such period of years may be five, ten, fifteen or twenty years, and such policies are commonly known as five year endowment, ten year endowment, fifteen year endowment and twenty year endowment policies.

All of such policies—ordinary life, limited payment life and endowment policies—are issued at level premiums, and hence all accumulate reserves from the beginning.

The premiums upon these policies naturally differ.

The fewer the premiums payable, or the sooner the policy is payable, the greater the premium rate.

The premium on a ten year endowment contract is higher than the premium on a ten pay policy issued at the same age, and the latter is higher than the premium on an ordinary life policy at the same age.

Another type of insurance exists, designated as term insurance. Under this type the face of the insurance is payable only in the event death occurs within a specified term, usually short—one year, two years, etc. At the end of that term the policy is at an end. There is nothing left—no cash surrender value, no reserve. The amount of premium charged is just sufficient to discharge the mortality cost for the term.

In consequence the premium is extremely low. An individual rarely wishes to insure himself against the risk of death occuring solely within a short period of time.

He prefers a policy which he may maintain until he dies. Hence, little demand exists for the term policy.

Similarly, the insurance is unattractive to an insurance company. It involves the greatest amount of liability for the least premium. There is nothing from which unexpected mortality, losses in investments or expenses may be made good. It involves disproportionately heavy expense, in relation to the premium, to place the business on the books.

Hence, term insurance is not featured by any of the companies. Indeed, it is not offered generally on the market. It is reserved for writing to cover preferred risks in special circumstances.

Practically the function of term insurance is limited to its purchase with cash surrender values, upon default in premium payment, as a means of giving these values in some manner to the policyholders.

Where surrender values of ordinary life, limited payment life, or endowment policies are thus employed the ordinary life, limited payment life and endowment policies are not themselves extended, but they or their values are employed in the purchase of a different and cheaper form of insurance.

Computation of Insurance Reserves or Net Values and Premiums.

We may illustrate the computation of insurance reserves or net values as follows:

Let us take the tail end of the American Experience Table of Mortality. Of the 100,000 lives at age 10, with which the table starts, all have died by the beginning of

the age 90, save 847. According to this table, the number living and the number dying each year after age 90 are as follows:

Age	Number Surviving at Commencement of Year	Deaths During Year
90	847	385
91	462	246
92	216	137
93	79	58
94	21	18
95	3	3

Let us assume that the 847 persons living at the beginning of the year, age 90, take out each a policy of $1,000 on his life, payable at death, requiring the payment of premiums annually during life. Let us assume a rate of interest of 4½ per cent, and that the annual premium required from each is $494.32. In fact, the exact premium required is nearly one half of a cent greater than that, or about $494.32½.

It is to be remembered that in all American insurance calculations it is assumed that the premiums are paid at the beginning of the year, and that deaths occur at the end of the year.

Hence the 847 persons living at the beginning of the year, age 90, pay at that time premiums of 847 × 494.32, or $418,689. This sum, improved at 4½ per cent interest, amounts at the end of the year to $437,530. At that time, according to the table, 385 deaths occur, requiring the payment in policies of $385,000, and, after deducting this sum from the fund in hand, there is left $52,530. This balance is the exact sum which the policyholders have paid

in, plus the interest on the same, and less the cost of insurance for the year; and, as it is the saving or reserve on account of the policies of the 462 surviving members, the reserve of each policy is 1/462 of $52,530, or $113.70.

Now, this sum is not only the saving or reserve on account of each policy, but is also the exact difference between the payments that the member will thereafter have to make on his policy issued at age 90 and those which he would have to make on a new policy issued at age 91. That is to say, if he entered at age 91 the annual premium would be greater than $494.32, and the present worth of the excess of such future annual premiums over $494.32, the premium at age 90, is exactly $113.70. Hence this amount is both the reserve and the **value** of the policy at the end of the year, age 90; because it represents both what has been saved or reserved for the future on account of the policy and the difference between what the policy will cost in the future and what a new policy would cost. The two are always the same.

Starting at the beginning of the year, age 91, with a fund of $52,530, there is added to it immediately the premiums paid by the 462 surviving members (462 × 494.32), amounting to $228,376, and these two sums improved with 4½ per cent interest amount at the end of the year to $293,547. At that time, according to the table, 246 deaths occur, and $246,000 must be paid in policies, thus reducing the fund to $47,547. As this fund is now held on account of only 216 policies, the reserve, or net value, of each is 1/216 of $47,547, or $220.12.

At the beginning of the year, age 92, the 216 surviving members pay in premiums 216 × 494.32, or $106,773, and this, added to the balance of $47,547 at the end of the previous year, amounts to $154,320, and this sum, im-

proved with 4½ per cent interest, amounts at the end of the year to $161,264. At that time, according to the table, 137 deaths occur, and, therefore, $137,000 must be paid out in policies, leaving a balance in the fund of $24,264. As this fund is held on account of only 79 policies, the reserve or net value of each is 1-79 of $24,264, or $307.14.

At the beginning of the year, age 93, the balance of $24,264 is augmented by the premiums paid by the 79 members (79×494.32), amounting to $39,051, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $66,165. At that time 58 deaths occur, and accordingly $58,000 must be paid in policies, reducing the fund to $8,165. But as this fund is held on account, now, of only 21 policies, the reserve, or net value, of each is 1-21 of $8,165, or $388.81.

At the beginning of the year, age 94, the balance of $8,165 is increased by the premiums paid by the 21 members (21×494.32), amounting to $10,381, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $19,380. But, as 18 deaths then occur, requiring the payment of $18,000 in policies, the balance remaining is only $1,380. This sum, however, is held on account of only 3 policies, and, therefore, the reserve, or net value, of each is one-third of that amount, or $460.

At the beginning of the year, age 95, the three surviving members pay in premiums 3×494.32, or $1,482.96, and this sum, added to the balance of $1,380, makes a total fund in hand at the beginning of the year of $2,862.96. This sum, improved at 4½ per cent interest, amounts at the end of the year to $2,992, lacking only $8 of enough to discharge the $3,000 of policies maturing at that time. This difference of $8 is accounted for by the fact that we have used as the premium $494.32, whereas the amount is

more nearly $494.32½. In the calculations we have included 1,628 premiums, and a difference of one cent in the amount of each premium, that is, a premium of $494.33 instead of $494.32, would have increased the fund by $16.28, disregarding interest, thus producing a surplus, with interest, of probably $10.

The statement made above, that the net value of a policy is the difference between what it will cost the policyholder in the future and what a new policy would cost him, that is to say, the difference between the present worth of the premiums yet to be paid on the policy and those necessary to be paid on a new policy taken at the attained age, is applicable to a policy that has become paid up, as well as to a policy on which premiums are continuing. For instance, on a policy that has become paid up, the policyholder has no more premiums to pay, and, therefore, the net value of such a policy at any date is the present worth of the payments that he would then have to make on a new policy, or, which is the same thing, the single premium that he would then have to pay for a paid-up policy.

Article 3050 of the Revised Statutes of Texas of 1895, which was dropped from the statute in 1909 as unnecessary, though the term "net value" is continuously employed (Articles 4682, 4688, Revised Statutes of Texas, 1925), contains an accurate definition of "net value," as follows:

> "The net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated above."

Of course, where there are no premiums to be paid the

net value is the net single premium itself without deduction.

It may be well for us to illustrate here how annual premiums and net single premiums are determined. We have seen that an annual premium of $494.32 is just sufficient at age 90 to enable the company to pay the losses as they mature, in accordance with the table. But how is that figure ascertained?

Since the object is that the premiums and interest to be received shall just equal the losses to be paid, it is necessary to calculate at the beginning of the year, age 90, the present worth of all losses to be paid in the future and the number of premiums, or, rather, the present equivalent of the number of premiums, to be received in the future, and then to divide such equivalent number of premiums into the present worth of the losses, and the result must be the amount of each premium.

For instance, the present worth at the beginning of the year, age 90, of the losses to be paid in the future, each discounted at 4½ per cent compound interest, is as follows:

$385,000	to be paid in 1 year has present worth of	$368,421
246,000	to be paid in 2 years has present worth of	225,270
137,000	to be paid in 3 years has present worth of	120,053
58,000	to be paid in 4 years has present worth of	48,637
18,000	to be paid in 5 years has present worth of	14,444
3,000	to be paid in 6 years has present worth of	2,304
	Total present worth of losses.....	$779,129

Similarly, the equivalents now of the number of premiums to be paid in the future, such numbers being discounted at 4½ per cent compound interest, are as follows:

847 premiums to be received now are equal now to....	847	premiums
462 premiums to be received in 1 year are equal now to..	442.105356	premiums
216 premiums to be received in 2 years are equal now to.	197.797680	premiums
79 premiums to be received in 3 years are equal now to.	69.227463	premiums
21 premiums to be received in 4 years are equal now to.	17.609781	premiums
3 premiums to be received in 5 years are equal now to.	2.407353	premiums
Present equivalent of premiums to be received in future.....	1,576.147633	

The amount of each premium to be received, therefore, is ascertained by dividing $779,129, the present worth of the losses, by 1,576.147633, the present equivalent of the number of premiums, and the result is $494.3248, which is the amount of each annual premium.

The net single premium at age 90 for $1,000 of insurance is as easily calculated from the foregoing figures. Since the present worth of all the losses to be paid is $779,129, and since these losses cover the 847 lives in being at the beginning of the year, age 90, the single premium necessary to be paid by each to provide for such losses is 1/847 of $779,129, or $919.858.

Now, having ascertained how to compute the net single premium at any age, and how to obtain the present worth of premiums to be paid in the future on any policy, let us

Inquire whether the figure of $113.70, which we have seen is the reserve at the end of the first year of a policy issued at age 90, is also the difference between the present worth of all premiums remaining to be paid under the policy and the net single premium for new insurance taken at age 91.

The present worth of the losses to be paid after the end of the year, age 90, is as follows:

$246,000	to be paid in 1 year has present worth of	$235,407
137,000	to be paid in 2 years has present worth of	125,455
58,000	to be paid in 3 years has present worth of	50,825
18,000	to be paid in 4 years has present worth of	15,094
3,000	to be paid in 5 years has present worth of	2,407
	Total present worth of losses to be paid	$429,188

As these losses cover the 462 lives surviving at the end of year, age 90, the single premium necessary to be paid by each to provide for the losses would be 1 462 of $429,188, or $928.97.

New premiums would remain to be paid by the policyholders joining at age 90 as follows:

462 premiums immediately, being equal immediately to	462	premiums
216 premiums in 1 year being equal now to	206.698608	premiums
79 premiums in 2 years being equal now to	72.3426670	premiums
21 premiums in 3 years being equal now to	18.4022237	premiums
3 premiums in 4 years being equal now to	2.5155683	premiums
Present equivalent of number of premiums to be paid in future	761.9591198	premiums

As each of these premiums will be of the same amount previously fixed, to wit, $494.32, the present equivalent of the total amount to be paid will be 761.9591198 × 494.32, or $376,651. And, as there are 462 persons surviving at the end of the year, age 99, by whom these premiums are to be paid, the amount to be paid by each, that is to say, the present worth of the premiums to be paid by each, is 1/462 of $376,651, or $815.26.

Deducting this sum, $815.26, the present worth of the premiums to be paid by each policyholder, from $928.97, the net single premium at the attained age for new insurance, the difference is found to be $113.71, which is the net value of each policy at that time. This figure, it will be noted, is within one cent of the figure previously named as the reserve, the difference being due merely to the elimination of fractions.

Discussion of Petitioner's Authorities Under Point A.

Before discussing the authorities, let us say, with reference to the authorities cited by the petitioner under this and other points, that courts not familiar with the

principles and terminology of the insurance business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions and also of some, though fewer, errors of substantive decision.

Not infrequently such errors on the part of the courts have been attributable to a lack of familiarity with insurance terms on the part of the attorneys representing insurance companies in the cases in which such errors have crept into the Court's opinions.

Further, it is proper to mention that some of the cases have to do with policy provisions that are variant from the normal, and some with insurance companies engaged in a different type of business from level premium or legal reserve life insurance.

Formerly, there were many "pure assessment" life insurance companies in existence, as distinguished from "legal reserve" or "level premium" life insurance companies. Afterwards, there sprang into existence many "quasi-assessment" life insurance companies, namely, companies that, instead of increasing the premium rate each year during the life of the policy (as did the "pure assessment" companies), had, without operating on a "level premium" or "legal reserve" basis, sought to avoid the stepping-up of the premiums each year, by charging a little more than necessary and stepping up the rates by five-year periods or other periods, and created some form of fund termed "safety fund," or "guaranty fund," or otherwise similarly designated, for the purpose of thus providing some semi-stability to the rates for a longer or shorter period.

Courts have been called upon to determine the applica-

tion of statutes to the terms of such irregular contracts. Occasionally, expressions in statutes have been expanded beyond their correct meaning in order to cover irregular contracts of this nature, which in truth and in spirit should be held coverable by such statutes.

But, when courts are dealing, as here, with the normal "level premium" or "legal reserve" contract, the terms of which are clear and definite, and the insurance expressions contained in which are correctly used, and are exactly in accord with the language of the statutes, in which insurance expressions are likewise correctly employed, the opinions in the irregular contract instances mentioned afford no ground for distorting stipulations or statutory provisions in order to award a judgment in favor of a plaintiff.

As already indicated, the instances are few in which there have been **errors of substantive decision.** Though a court may be unfamiliar with the principles and terminology of the business, and its opinion may contain errors of expression, the Court correctly senses the right and justice of the case.

Indeed, many errors have crept into the law and given rise to much difficulty for a time, because of confusion of thought and errors of expression in rendering decisions that morally were right, and legally also were right, but only were incorrectly or inartificially expressed.

The petitioner has cited two cases decided by circuit courts of appeal, one by the Sixth Circuit and one by the Fourth Circuit, in which this Court has refused writs of certiorari, and the motion for certiorari in this case primarily was based on the asserted conflict between the decision of the Circuit Court of Appeals in this case and the

decisions of other circuit courts of appeal in the two cases mentioned.

This Court in no way indicated by its refusal of certiorari in Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, and Harvey v. Union Central Life Ins. Co., 45 Fed. (2d) 78, that it approved either the decision or the opinion in either of these cases.

The case of Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, is essentially different in its policy provisions and in its facts from the case at bar. Indeed, in that case the policy provisions were variant from the normal. The claim and practice of the company in that case was that the dividend of $115.20 of June 16, 1927, was subject to the use of the insured only in the event the premium of June 16, 1927, was paid, and that if such premium was not paid the dividend was retainable by the company as its own property. The Court rejected this claim, both from a consideration of the dividend clauses of the policy and from the consideration that the company was a mutual company. Since the Court held that a sum was available for the benefit of the policyholder, for a definite or specific use of which the policy made no provision, the Court interpreted a rather general and obscure term in the policy, "the balance of value" (which, under a policy provision, would be applied to the purchase of extended insurance), as sufficient to include this additional value of $115.20, which the Court held was available, but which the company had unjustifiably attempted to claim and retain as its property. The term, "balance of value," appeared in a clause as follows:

> "If the available cash value be insufficient to pay an annual premium and interest as above stated, the

company will continue the contract as extended insurance for such time as the **balance of value** will permit."

The case at bar is radically different. Here the dividend was definitely payable, and the policy provided a definite, specific and unambiguous method of disposition of the same in the precise contingency that occurred, namely, the lapse of the policy. In such contingency, the dividend was payable in cash. The former policyholder submitted to the company an order directing the payment of this dividend in cash to a certain creditor, and the company paid the dividend in cash, in accordance with the order. The lapsed policy and the paid dividend were then closed transactions, and in such situation, with formal notice of the company's cessation of the insurance in an envelope in the policyholder's home, the policyholder died. This suit is brought in an attempt to nullify the payment of the dividend, upon the fanciful theory that the policyholder was then non compos mentis, and, upon the success of such nullification, to force an ex post facto application by the company of an equivalent amount, to the purchase, without contract, and contrary to contract, of term insurance, from a date long past to a date, as it had already happened, that included the death of the former policyholder.

Harvey v. Union Central Life Ins. Co., 45 Fed. (2d) 78, was by a divided court.

It involved the respondent's form of contract under an earlier edition, but the issue there decided is not involved in the case at bar.

The decision in the Harvey case was placed squarely on the ground that, in the circumstances of the case, the extended insurance ran, not from the valuation date fixed in

the policy, but from the time of delivery of the policy, and that, inasmuch as the term did not begin to run until the anniversary date after delivery, the extended insurance was in force at the death of the insured without reference to, and without taking into account, any dividend, in figuring the period of extended insurance.

That such was the decision of the Court appears from the following excerpt from the Court's opinion:

> "This shows conclusively that the mere fact of paying an annual premium in advance will not operate to penalize the insured by shortening the term of insurance to less than one year from the agreed date upon which the policy becomes effective and from which the policy year begins to run. The Court was in error in sustaining the contrary view and **must be reversed.**"
>
> "In view of this ruling, a determination of the other issues becomes somewhat unnecessary, and they will be discussed but briefly."

Having thus decided to reverse the judgment below, the Court, in taking up such other issues for casual discussion, intimated but without deciding and without any careful consideration, and without resting the decision on such point—that the dividend could have been used to increase further the term of extension, and added that "the company held two policy lien **notes**, and even if the dividend should have been paid in cash it was a creditor in possession with the right to apply the money to the reduction of the loan. * * *"

According to the opinion, there was actual indebtedness evidenced by "notes." The Court was not speaking of a policy loan agreement, such as we have in the case at bar. If the Court did have such a lien in mind, the statement of the Court that "it was a creditor in possession, with the

right to apply the money to the reduction of the loan," is clearly erroneous, being contrary in principle to the doctrine of Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, as pointed out by the Circuit Court of Appeals (Tr., p. 227).

POINT B.

The 1931 dividend did not operate to purchase extended insurance under the provisions of Article 4732 of the Revised Statutes of Texas of 1925.

The petitioner's contention seems to be that a contractual obligation to pay the dividend of $74.80 of June 10, 1931, in cash to the policyholder, rather than to substitute therefor term insurance for a brief period in favor of the former policyholder's beneficiary, is in contravention of the Texas statute mentioned.

The statute contains the term "dividend addition," which corresponds with the term "paid-up addition" used in the policy.

The petitioner's contention is that the dividend of June 10, 1931, should be treated as if included in the term "dividend addition."

Though subdivision 7 of the statute is the one presented by the petitioner, yet the term "dividend addition" is repeatedly used in both subdivisions 6 and 7 and consequently we set both forth with such explanatory matter as is deemed proper, as follows:

Statute.	**Explanatory Matter.**
"Art. 4732. Policy shall contain what.—No policy of life insurance shall be is-	

Statute.	Explanatory Matter.
sued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall contain provisions substantially as follows: • • • "6. That after three full years premiums have been paid, the company at any time while the policy is in force, will advance upon proper assignment of the policy and upon the sole security thereof	The statutory requirement that the advance shall be upon the **sole security** of the policy doubtless precludes any attempt by a company to demand the personal obligation of the policyholder to repay the amount received from the company. The policy provision in the present instance is for a loan "on the sole security of the policy, on assignment thereof" (Tr., p. 87, Art. 19); and the loan agreement consists merely of an acknowledgment of the sum received from the company and an assignment of the policy as security therefor, with a stipulation that if and when the amount received from the company,

Statute.	Explanatory Matter.
	with interest, shall exceed the cash surrender value of the policy, thereupon the insurance shall cease (Tr., pp. 91-92).
at a specified rate of interest a sum equal to, or at the option of the owner of the policy less than,	
the legal reserve at the end of the current policy year on the policy and on any dividend addition thereto.	Observe the expressions "legal reserve" and "dividend addition" so often hereinbefore referred to. The legislative use of these terms implies and makes necessary complete familiarity with the same on the part of the courts. That which the legislature takes cognizance of and requires that the courts shall interpret, courts also must take cognizance of. "Dividend addition," according to the uncontradicted evidence, means, and always has meant, just one thing, namely, a paid-up addition to the policy purchased with a dividend. It could not mean the dividend itself. A dividend declared immediately payable in cash, or disposable in cash according to some option of the policyholder, is utterly in-

Statute.	Explanatory Matter.
	consistent with a provision for borrowing such dividend. Also, it is inconsistent with "additions to the policy," which implies something permanently added to the policy. Also, it is inconsistent with "legal reserve on * * * dividend additions," because no legal reserve exists on a dividend. Indeed, "dividend additions" can mean nothing other than that which the uncontradicted evidence of the actuaries indicates namely, a paid up addition to the policy purchased with a dividend. On such a paid up addition there is, of course, a "legal reserve," as the explanation hereinbefore given of the reserve or net value of a policy shows.
less than a sum not more than two and one-half per cent of the amount insured by the policy, and of any dividend additions thereto; and	Here it will be observed a surrender charge is permitted of $2\frac{1}{2}$ per cent of not only the face amount of the policy, but also the face amount "of any dividend additions thereto." This second use of the term "dividend additions" likewise indicates its similarity in nature to "the amount insured by the policy." If

Statute.

that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year, which provision may also provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall also be stipulated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

Explanatory Matter.

the policy is of $10,000 and the dividend addition is of $152, the permitted surrender charge is 2½ per cent of $10,152. This expression plainly shows that the dividend addition is an increased amount of insurance added to the face of the policy.

Statute.	Explanatory Matter.
This provision shall not be required in term insurances, nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies.	Here also is legislative recognition of the type of insurance hereinbefore referred to as "term insurance," also of the fact that such type of insurance is radically different from other types referred to. While a paid up term insurance, such as is purchased with the cash surrender value of a lapsed or surrendered policy, has a reserve or net value, that reserve or net value is continuously depleted during the term, and by the end of the term is entirely exhausted. The reserve on such a policy covers merely the mortality cost of the insurance during the term. When the term expires the insurance is at an end. It has no reserve, no cash surrender value indeed, nothing.
No provision herein shall compel any company to loan on any policy an amount greater than ninety-seven and one-half per centum of the face value thereof, including net dividend additions thereto.	This provision merely makes certain, by repetition the permitted surrender charge of $2\frac{1}{2}$ per cent of the amount insured by the policy and of any dividend additions thereto. This third use of the term "dividend additions" again clearly indicates that it constitutes

Statute.	Explanatory Matter.
	additional insurance purchased with a dividend, just as the uncontradicted evidence in the case shows.
"7. A provision which, in event of default in premium payments, after premiums shall have been paid for three full years,	This subdivision is the subdivision on which the plaintiff relies. The prior subdivision just quoted relates to loans on policies. This subdivision relates to premium defaults.
shall secure to the owner of the policy a stipulated form of insurance,	Observe that the requirement is merely for: **a** or **some** "stipulated form of insurance" not necessarily "term insurance"; indeed, not any form specified by the legislature but rather on the contrary **any form that may be stipulated by the parties.** A paid-up addition to the policy is a form of insurance, and this, as a rule, is the stipulated form. This was the form of insurance stipulated in the present case by the fourth subdivision of Article 11 (Dividend options) hereinbefore copied. The policy provision so stipulating is in exact compliance with the statute.
the net value of which shall be at least equal to the re-	Here again are legislative employments of the terms

Statute.	Explanatory Matter.
serve at the date of default on the policy,	"net value" and "reserve" so often hereinbefore referred to. The reserve (less surrender charge covered by a subsequent clause) is to be used to purchase the "stipulated form of insurance," and the effect of this clause is to prevent the insurer from imposing any loading or charge for expenses for its issuance of the "stipulated form of insurance" because the "net value" of the "stipulated form of insurance" must not be less than the "reserve" purchasing the same. Hence the "stipulated form of insurance" is to be acquired solely for the net premium mathematically requisite to be charged for such insurance as hereinbefore explained, and such net premium at the issuance of the stipulated form of insurance is exactly the net value of the stipulated form of insurance at such time.
and on any dividend additions thereto,	This is the expression which the plaintiff contends includes the dividend of June 10, 1931. The plaintiff's contention, as hereinbefore often explained, is

Statute.	Explanatory Matter.
	that a dividend should be treated as a "dividend addition" whereas it plainly appears from the uncontradicted evidence and from the repeated use of this same term "dividend additions" in subdivision 6 of the statute hereinbefore copied; that the term "dividend additions" means and always has meant, in the insurance business, merely paid up additions to the policy purchased with dividends.
specifying the mortality table and rate of interest adopted for computing such reserve,	Here again is evidence of legislative familiarity with the fact that "reserves" are computed in accordance with an adopted mortality table and rate of interest.
less a sum not more than two and one half per cent of the amount insured by the policy, and of any existing dividend additions thereto,	Here again is legislative permission that there may be deducted from the reserve, as a surrender charge, 2½ per cent of the amount insured by the policy and also of any existing dividend additions thereto. Two and one-half per cent of $10,000, the face of the policy in question, is $250. This was the legally permissible surrender charge. The

Statute.	Explanatory Matter.
	surrender charge employed by the defendant was only $60. Here also in this the fifth use of the term "dividend additions" in subdivisions 6 and 7, it appears again that dividend additions correspond to the amount insured by the policy, that, in other words, dividend additions are additional amounts of insurance purchased by dividends just as the uncontradicted evidence shows.
and less any existing indebtedness to the company on the policy;	Here is legislative permission that indebtedness to the company on the policy may be deducted from the reserve.
Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid,	Here is merely a provision that the cash surrender value shall be payable in cash on surrender of the policy within one month from date of default.
and may stipulate that the company may defer payment for not more than six months after the application therefor is made.	

Statute.	Explanatory Matter.
This provision shall not be required in term insurances."	Here again is legislative recognition of the radical difference between "term insurances" and other insurances as hereinbefore explained.

No argument seems necessary to expose the error of the petitioner's contention that a dividend declared and ready for payment is a "dividend addition" to the policy. The uncontradicted evidence of the two actuaries offered by the respondent conclusively establishes the one meaning which the term "dividend additions" has and always has had among those engaged in the insurance business (pp. 24-25, ante).

Indeed, no court familiar with the principles of such business could entertain, for a moment, any other idea of the term.

But courts cannot be omniscient, and courts not familiar with the principles and terminology of the business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions, and also of some, though fewer, errors of substantive decision.

But the business is of such great importance in the national economy and it so intimately affects substantially the whole of the population, that the greatest importance exists that its principles and terminology be clearly understood whenever a subject matter is involved that affects, in principle, not one policyholder only, and not one contract only, but the entire business.

A question sometimes has been suggested whether an

attempt should not be made by witnesses to develop, upon the trial of a case, a full explanation of the principles and of the terminology of the business. But the frequency with which a familiarity with such principles and terminology is required for the determination of controversies precludes the introduction of such evidence on each occasion, and the crowded condition of trial court dockets and the circumstances surrounding trials in courts of first instance are quite unfavorable for the introduction of such evidence on any occasion. Indeed, in any case, offered evidence of such character, unless quite limited in its scope (as was the evidence of the actuaries here such evidence being limited to the signification of the terms "dividend additions" and "paid up additions" the issue regarding the same being the only issue intimated on the plaintiff's pleading) would certainly be excluded by the trial judge as irrelevant to any issue in the case.

But the frequency of insurance controversies requiring a familiarity with the principles and terminology of the business, and the vast number of people affected by the business undoubtedly bring such principles and terminology within the realm of judicial knowledge.

And, indeed, the legislative use of insurance terms, which it is the duty of the courts to interpret, makes it necessary for the courts at all times to have a familiarity with the principles and the terminology of the business.

Returning to the subject of the statute presented by the plaintiff, we quote from the Supreme Court of Texas in Gilley v. Missouri State Life Insurance Company, 116 Tex. 43, 49, 50, 273 S. W. 825, 285 S. W. 807, as follows:

> "The provision of the law which requires that the policy shall secure to the owners a stipulated form

> of insurance, whether paid up or extended insurance, designates that such insurance shall be of a net value equal to the reserve to the date of default, less a sum not more than two and one half per cent of the amount insured by the policy. The law clearly recognizes the rule adopted by insurance companies, in arriving at the value of the reserve of policies, to first deduct from the excess in current premiums two and one half per cent of the amount of the policy in the nature of a carrying charge; and, if there be an amount left, it represents the real reserve, which may be used for the purpose of obtaining a loan, paid up insurance, or extended insurance, as the insured may elect. * * * If this two and one half per cent be deducted as the law contemplates, and as it must have actually been done by the company, the policy in fact had no reserve value at all."

Thus the Court said, in that case, if the permitted surrender charge of 2½ per cent were deducted from the amount which otherwise was required by law to be paid in cash to the policyholder, or used to purchase a stipulated form of insurance, there was nothing left, and that the statute was inapplicable to the circumstances.

The same condition existed here, even if the plaintiff be indulged in the whole of his contention. In other words, if a computation is made of the figures involved in his contention it will be found that the statute is nugatory, for that if the dividend of $74.80 be added to the entire reserve of $970.00, a sum is obtained of $1,044.80, and if from this sum be deducted the statutorily permitted surrender charge of $250.00, a difference is obtained of $794.80, and if an attempt be then made to discharge with this sum the indebtedness of $898.88, it is found that the sum lacks $104.08 of meeting the indebted-

ness, and, of course, leaves absolutely nothing for payment in cash or for use in purchasing any form of stipulated insurance.

Discussion of Petitioner's Authorities Under Point B.

Great Southern Life Ins. Co. v. Jones, 35 Fed. (2d) 122, involved a twenty-pay policy, which made no provision for dividends, but which had attached to it nineteen so-called premium reduction coupons, maturing one each year so long as the premiums should be paid. Each coupon was a promise by the company that it would pay the amount stated therein in any one of several optional settlements. Such options were similar to usual dividend options. Eleven annual premiums were paid, but the twelfth premium was not paid. The Court found that "the premium reduction coupons on December 24, 1921 (twelfth anniversary of the policy), had a then guaranteed cash value of $425.50 due the insured at the time of his death."

The Court confused "coupons," the payment of which was guaranteed, and which constituted, therefore, a fixed liability of the company, to meet which a reserve must be provided (see pp. 44-46, ante), with "dividends," which are declarable only out of surplus, when, "by reason of good management, good risks, or the like, the insurer's business shows results above death losses, expenses and reserves" (Tr., p. 224). The Court then proceeded to confuse "dividends" with "dividend additions." An Oklahoma statute required that each policy issued should provide for a stipulated form of insurance, the net value of which should be at least equal to the reserve at the date of default on the policy and on dividend additions thereto, if any, less any existing indebtedness to the company.

The Court, guilty of error of expression, due to a lack

of familiarity with the principles of the insurance business, could have reached the same result had it known that a reserve according to the assumed mortality table and rate of interest was kept, and was required to be kept, under fundamental principles of insurance hereinbefore discussed, to meet not only the face amount of the insurance as a death benefit, but also each maturing coupon attached to the policy.

At the trial of the case at bar, the petitioner used an actuary as a witness in her behalf, but this witness was not asked by her to testify as to the meaning of the term "dividend addition," although two actuaries, placed on the stand by the respondent, had testified that the term has, and always has had, but one meaning, to wit, the amount of insurance purchased with a dividend and added to the face of the policy. The reason that the petitioner's actuary did not contradict these witnesses was, of course, the single, well-understood and undeniable meaning of the term in insurance parlance.

First Texas State Ins. Co. v. Smalley, 111 Tex. 68, 228 S. W. 550, and Occidental Life Ins. Co. v. Jamora, T. C. A., 44 S. W. (2d) 808, are cited as interpreting the term "dividend additions" as meaning "dividends." But in neither case did the policy make provision for dividends, and in neither case was the Court attempting to arrive at the meaning of the term "dividend additions."

United States Life Ins. Co. v. Spinks (Ky.), 96 S. W. 889, 103 S. W. 335, is a case from Kentucky, the courts of which, notoriously among the insurance fraternity, have displayed a lack of familiarity with the principles and terminology of the business, and an erratic and conflicting course of decision which even the bar of that state recog-

nizes. The policy in that case contained a provision with reference to dividend, as follows:

> "The said company agrees, in case the life insured survive to the end of the specified period, if this policy be then in full force, to pay to the legal holder or holder of this policy the dividend apportioned to this policy from its profits by said company."

Four annual premiums were paid, but the fifth premium was not paid, and the insured and the beneficiary requested the company in writing to apply "the entire reserve on the policy, including dividend additions, if any," to the purchase of nonparticipating extended insurance. Pursuant to such request, the company delivered a certificate of extended insurance expiring in August, 1898, and the insured died in September, 1898.

Suit was brought on the theory that out of the surplus there was applicable to the policy a sum sufficient to increase the term of extension beyond the date of the death of the insured. Because the controlling New York statute required the nonforfeitable reserve to include a sum on account of "dividend additions," and because the Court thought that a dividend was a dividend addition, and because the provision in the policy with reference to a dividend, so the Court thought, did not exclude the participation of the policy in the accumulated surplus, the Court took the position that a sufficient share of the surplus was available to increase the term of extended insurance beyond the date of the death of the insured.

This was a badly handled and badly decided case, the insurance company changing its position at different times during the progress of the proceedings.

The Court appears to have been influenced by what it

considered either the insincerity, or the ignorance, or both, that characterized the presentation of the defense.

The Court merely defined the expression "dividend additions" as used in the New York statute.

A few years later the same Court had occasion to define the same words appearing in a contract, and it then distinguished the Spinks case, and held that without doubt the expression "dividend additions" meant "additions to the insurance from the dividends declared by the company" (Mutual Benefit Life Ins. Co. v. O'Brien [Ky.], 116 S. W. 750). Still later, the same Court had occasion to define the same expression, "dividend additions," appearing in a Kentucky statute, and said:

> "It means something added to the policy in the shape or form of paid-up insurance. * * * It in no sense represents unapportioned assets, or surplus, of the company, but has reference solely to paid-up insurance" (Jefferson v. New York Life Ins. Co., 151 Ky. 609, 152 S. W. 780).

POINT C.

The policyholder possessed no contractual or statutory right that the 1931 dividend should be applied by the company to the purchase of term insurance, nor did the policyholder ever request that it be so applied.

The petitioner contends, under point C, that the policyholder "had the right to have (the 1931 dividend) applied to provide for extended insurance," and "timely directed that it be so applied."

In support of the right, she contends that the current dividend, declared and payable only on June 10, 1931,

constituted "accumulations of dividends at interest" within the meaning of article 17 of the policy (Division 3 thereof, copied and commented on at pages 17-18, ante). Such accumulations of dividends, as indicated by our comments on the prior page of this brief, are accumulations as a result of the exercise by the policyholders of the option (under the third division of article 11 of the policy, page 10, ante) to leave dividends with the company to accumulate at 3 per cent interest, etc., until the maturity of the policy. But here the undisputed evidence is that all prior dividends, namely, those of 1928, 1929 and 1930, had been used to minimize the necessary cash premium payment, and that none of such dividends had been left with the company at interest, and no such election had been exercised by the policyholder.

As for the claimed timely direction by the policyholder that the dividend be applied to the purchase of term insurance, the petitioner again brings forward, as sole justification for such claim, the reference in the letter of Lee & Lee to the company of September 14, 1931, to a conversation between their local agent at San Angelo and the former insured on September 1, 1931. Such reference in such letter does not concern any application of dividend on the policy in suit to the purchase of term insurance. It has reference to a proposed plan of obtaining from the company whatever moneys the former insured might be entitled to, and using such moneys in the restoration and carrying of $15,000 of insurance (a small portion of the insurance which he had been carrying), and also, according to the proposal, making some payment to Lee & Lee on the note to them of $1,643.63. The former insured expressed his unwillingness, according to the reference, that any portion of the money should go to Lee & Lee.

No mention was made of term insurance. No policy was identified. And the conversation occurred long after July 11, 1931, the expiration of the days of grace, when the insurance had terminated and the rights of the parties had become fixed.

As said by the Circuit Court of Appeals:

> "The agents in their letter of September 14th communicated to the company that on September 1st Williams, in rejecting the negotiations and refusing to pay anything to the agents, had said he wanted every nickel applied to carrying the policies. There were seven policies involved. This statement was too indefinite to serve as a direction to apply this dividend in any particular way. Moreover, it was too late for him to apply it to extend this policy, for it had become void on July 11th, and could only be reinstated on payment of the premium with interest and satisfactory medical examination, and Williams since August 16 had been an ill man" (Tr., p. 228).

POINT D.

The respondent's contractual obligation with reference to the 1931 dividend being to pay the same in cash to the policyholder, the company owed no duty and possessed no right, even though it so desired, to apply the dividend as a credit on, or in reduction of, the policy lien.

The policy lien was not indebtedness of the policyholder. The policyholder did not owe the lien. The instrument was not enforceable against the policyholder personally. It constituted a mere lien on the policy.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so called liability of the policyholder never exists as a personal liability; it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning,** because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

The policy lien not only did not affect the policyholder personally, but it constituted no threat at the time to the existence and continuance of the insurance. The only immediate threat to such continuance was the nonpayment of the current premium.

Yet it is claimed that, without request, the company should have applied the dividend to the reduction of the policy lien.

The desire to apply the dividend on a mere lien, not a personal obligation, in the case of a lapsing policy would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

A policyholder who voluntarily relinquishes a policy of insurance, or who is compelled by financial necessity to relinquish a policy of insurance, may profit more from a cash payment, though small (here it amounted to several

hundred dollars for all policies), than from either the reduction of a policy lien which he does not owe, or a substituted insurance contract continuing for only a very brief period.

Especially may he so profit if, as here, he may receive the dividend (Tr., p. 89); whereas the substituted insurance contract advantages only his beneficiary.

See also discussion on pages 29-32, ante.

POINT E.

The undisputed evidence established, and the petitioner's own pleadings asserted, that the 1931 dividend was paid in cash, on the policyholder's written order, to specified creditors of his, prior to his death, and was not applied to the purchase of term insurance; and there is neither allegation nor proof on the part of petitioner of any statement by the company, or of reliance on any statement of the company, that it had been applied to the purchase of term insurance, on which to found the petitioner's present claim of estoppel.

Petitioner's point E indicates a peculiarly warped viewpoint. She says that the respondent "is estopped to say that the 1931 dividend was not applied to provide for insurance."

She herself alleges in her pleadings that her husband gave Lee & Lee an order on the company to pay the dividend to them, and that the company did pay it to them; and she offers in her pleadings to restore the sum to the company. She seeks to avoid these facts not by denying them, or by saying that the company represented that it had applied the dividend to the purchase of term insur-

ance but by alleging that her husband was non compos mentis at the time. She makes, in her pleadings, no claim of misstatement by the company, of reliance thereon, and of consequent estoppel (Tr., pp. 61 68).

Petitioner brings forward, apparently in support of the claimed estoppel, the premium notice of June 10, 1931, the reference in Lee & Lee's letter to the company of September 14, 1931, to the conversation of September 1st between their local agent and the former policyholder, and whatever criticism of the company, of jury consumption nature, she can conceive of. The premium notice and the letter have been sufficiently discussed on prior pages of this brief.

The insurance having ceased on July 11, 1931 but the company having sent to Lee & Lee on July 15, 1931, a memorandum of figures for use in enabling Lee & Lee to work out some plan with the former policyholder, such as the obtaining from the company of all sums payable by it under all the policies, and the restoration and continuance of some small portion of the insurance (mentioned in Lee & Lee's letter of September 14, 1931, as $15,000) the company naturally deferred the transmission of a check for the dividends on this and other policies until reasonable opportunity had been afforded to work out some such plan. But nothing having been accomplished, the company, on September 9, 1931, issued its check in favor of the former policyholder for the dividends, and transmitted the same to Lee & Lee for delivery. The check was returned with the agents' letter of September 14, 1931, and within a few days the company received the written order of the former policyholder, of September 18, 1931, directing payment of the dividends to Lee & Lee. Thereupon, in due course, on September 28, 1931, it issued its check in accordance with the order.

The former policyholder was under no misapprehension regarding the status of his insurance. The petitioner says that he was informed by Lee & Lee's representative that his insurance had ceased. The written order which he signed on September 18, 1931, referred to the policies as lapsed; and the company formally advised him on October 7, 1931, that all insurance had terminated. The company at no time after July 11th indicated to him that his policies were in effect, and no claim of that nature is asserted in the pleadings of the plaintiff.

The note taken by Lee & Lee's representative on September 18, 1931, for $914.77, was simply a note for the difference between the note of $1,643.63, which Lee & Lee held, and the dividends which Williams directed to be paid to them. In exchange for the order and the new note, the note of $1,643.63 was canceled and delivered to Williams, and was produced by the petitioner at the trial. Such note, as delivered to Williams, and as produced at the trial by the petitioner, had written across its face:

> "Renewed by new note for $914.77 this 18th day Sept. & cash of $852.10" (Tr. pp. 155, 150).

POINT F.

The insurance terminated ipso facto at the expiration of the days of grace on July 11, 1931. No notice by the company of such termination was necessary.

The petitioner claims that the insurance did not terminate ipso facto, but that under article 19 of the policy a formal notice was necessary. This article has reference to a termination of the insurance for failure to repay an advance, or interest thereon, secured by the policy. When such advances and interest, in the aggregate, exceed the

loan value, then, for failure to pay interest there may be a termination of the insurance, but only after one month's notice by the company to the insured (Tr., p. 87).

But in the present case the termination occurred, not in consequence of such a condition, but by reason of failure to pay the premium of June 10, 1931. Clearly, under the contract, the termination of the insurance for failure to pay the premium occurred ipso facto on July 11, 1931, the expiration of the days of grace.

REPLY TO PETITIONER'S POINTS 1, 2 AND 3.

POINT 1.

The pretended evidence of mental incompetency was without probative force to raise an issue of mental incompetency for submission to the jury. The payment of the dividend by the company, in accordance with the former policyholder's order of September 18, 1931, was effectual to discharge the company's obligation to such former policyholder.

Statement.

The issue as to mental competency was not passed upon by the Circuit Court of Appeals, as it held that under a proper interpretation of the insurance company's contractual obligations, there was no liability for insurance of any character after July 11, 1931, the last day of grace. Under the doctrine of **American Surety Co. v. Marotta**, 287 U. S. 513, 518, we do not suppose that the Court will pass upon such issue, but rather, if it should not affirm the decision of the Circuit Court of Appeals, we assume that the case would be remanded to such court for further consideration. Nevertheless, as the petitioner presents her contentions as to the issue of mental competency, we shall answer the same by substantially reproducing the contentions made by us in the Circuit Court of Appeals.

The preliminary statement in petitioner's supplemental brief, pages 3 and 4, as to the terms of the order executed by the former policyholder, and as to how George Lee, as attorney for Lee & Lee, the insurance company's agent at Dallas, happened to go to San Angelo to obtain it, may be

accepted as correct with one exception. There is no evidence to support the petitioner's statement that Lee & Lee tried to induce the former policyholder to surrender all of his policies and to transfer to Lee & Lee all sums accruing to him under such policies. With reference to that matter, the Court correctly found:

> "The general agents sought to interest him (Williams) in an arrangement by which he might surrender this and other policies which he had with the company, so as to pay the premium on and the loan against one of $15,000.00, and pay them $500.00 on their note, * * * but on September 4, Williams definitely refused the arrangement * * *."

The petitioner does not purport to make an adequate summary of what took place at the meeting between Lee & Lee's representative and the former policyholder on September 18, 1931, or of what the evidence was in support of or against her post mortem fancy of her husband's mental incompetency. We submit, therefore, the following statement:

On September 18, 1931, George Lee, attorney for Lee & Lee, went to San Angelo and there met his brother in law, Hervey Humlong, a resident of San Angelo, engaged in the ranching and gravel businesses. Williams was on his ranch at the time, about forty-five minutes from San Angelo by automobile. Between 10 and 10:30 in the morning George Lee and Humlong left San Angelo for the ranch, and when they arrived at the ranch they knocked on the front door of Williams' home, but no one responded to the knock. The two then drove further up the ranch, in the direction given them by Mexicans working on the ranch, for finding Williams. Unable to locate him, they returned by way of the ranch house, and this time Williams went to

the door fully dressed and admitted them to the front room of the house, where, according to these two witnesses, a conversation of from half an hour to forty five minutes, or even possibly an hour, took place. George Lee told Williams that he had come to ask Williams to execute an instrument releasing the dividends on his policies to Lee & Lee in order that they might be credited on the note that he had given to Lee & Lee for the advances on previous premiums (Tr., pp. 149, 150, 145, 146).

Williams replied that he was "peeved" at the company and did not wish to sign the instrument. He said that he was entitled to the dividends, that he did not think he had been treated fairly, and that he didn't feel like giving those dividends to Lee & Lee, although he admitted his indebtedness to Lee & Lee (Tr., pp. 150, 152).

George Lee argued that the dividends really ought to go to Lee & Lee, and that Williams was morally bound to transfer them to Lee & Lee, but advised Williams that the dividends belonged to him unless he was willing to transfer them to Lee & Lee (Tr., pp. 152, 155).

Realizing that Williams was rather irritable and discourteous, and that George Lee was not making much headway with his argument with Williams in the latter's then frame of mind, Humlong injected himself into the conversation, and began to talk with Williams about other matters. As both were interested in ranching and in the oil business, Humlong directed the conversation to such topics. Williams told Humlong where he got his herd of cattle, how he was trying to build it up, and how proud he was of it. He also mentioned that he had a large amount of oats stored in his bins that he was holding for a better price. Gradually Williams got into a better

frame of mind, and George Lee renewed his request and repeated his arguments (Tr., pp. 155-157, 146, 147).

Finally, Williams said, "Well, there is nothing to do, I guess, but to sign this thing, but I am sore about it." Thereupon he signed the order directing the payment of the dividends to Lee & Lee which is set forth on page 150 of the transcript. Williams never did get to where he was delighted to sign the instrument. According to George Lee, Williams did not jump at the opportunity, but gave his consent rather reluctantly. But Williams' attitude had changed from one of hostility to one of pleasantness and courtesy. He walked with Humlong and George Lee to the front gate, where their automobile was parked, and again engaged in more conversation about cattle and such matters (Tr., pp. 156, 146-148).

During the course of the conversation Williams told George Lee and Humlong that he had had his teeth extracted "recently" according to Lee, "the day before" according to Humlong, and he was expectorating some during the conversation, but neither saw him spit up blood. They did not examine the sputum to see whether it was tinged with blood. In the beginning he said that he had been losing sleep and was not feeling well, on account of having had his teeth pulled, and that his gums were swollen. But before they parted he was feeling a whole lot better (Tr., pp. 147, 155).

George Lee testified that Williams understood thoroughly that it was the dividends on all of his policies that he was directing the payment of to Lee & Lee (Tr., p. 152). Williams said that he was not suffering pain, though his teeth had given him some trouble, that his gums were swollen, and that he could talk only with difficulty. Williams did not show that he was in any pain (Tr., p. 153).

When asked as to the state of Williams' mind, George Lee stated:

> "I did not notice any variation in the intelligence of Mr. Williams' conversation at any time. He seemed to me to be perfectly rational all the way through. I did not notice his closing his eyes or being drowsy or outwardly manifesting any sleepiness. I did not notice any peculiar or unusual, abnormal expression out of his eyes" (Tr., p. 157).

Asked whether he made any observation as to Williams' mental condition during the course of the conversation, Lee replied: "Yes, sir; I observed him very closely." Asked as to what his observation was as to Williams' mental condition, Lee said: "Well, he appeared perfectly normal." The witness observed no forgetfulness on Williams' part and no lack of understanding of the conversation. On the contrary, he testified that Williams seemed to understand the whole conversation, and that he talked rationally (Tr., pp. 151-152).

Likewise, Humlong testified that he did not observe anything in Williams' conversation or in any talk on his part that was irrational. Humlong did not observe any forgetfulness on Williams' part or any unnatural or peculiar look out of the eyes (Tr., p. 147).

The only other two witnesses to testify as to what happened while Lee and Humlong were on the ranch that morning were Mrs. Williams, now the petitioner, and a hired hand on the ranch, Jeff Jordan.

Mrs. Williams testified that the conversation with Lee and Humlong lasted, "anyway, two hours" (Tr., p. 106). One cannot read her testimony, however, without being impressed that Mrs. Williams had a natural bent for exaggeration.

Mrs. Williams was in the dining room, kitchen and back porch, engaged in preparing dinner. She did not pay any attention to the conversation until she heard the name "Poteet" repeated several times, and she knew by that that they were talking about life insurance.

To use her own words, all else that she heard of the conversation was as follows:

> "One man would talk, and then the other would talk. One would say, 'It is this way, Mr. Williams,' and they would talk and talk. Then Mr. Williams would say, 'Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there.' About the time he would get the sentence halfway out, the other man would start up and say, 'But this is how it is, Mr. Williams,' and by that time the other man would come in."

She knew that the two strangers called to discuss business with her husband. She knew that her husband was discussing business with them. It never occurred to her to enter the room in which the strangers were discussing business with her husband and to inform them that her husband was mentally incompetent and unable to discuss business with them. Nor did it occur to her to interfere with her husband or to dissuade him from transacting business. It did not occur to her that he needed any assistance in the transaction of business. Indeed, she did not testify that lack of mental capacity existed at any time.

In response to an inquiry as to whether she heard her husband say that he would sign, or was willing to sign, Mrs. Williams replied: "I didn't know there was anything concerning signing; I just heard them say those words.

Every sentence he would start, he would tell them he was a sick man and was not able to talk to them?" (Tr., p. 106).

The house was a small five-room house, the living room being about ten by twenty feet, and each of the other rooms about ten by ten feet. As it was a hot day, everything was open, and Mrs. Williams, from where she was working, saw her husband sitting in a big rocking chair, "kinda stooped down this way" part of the time, and part of the time moving around. A little after the two men left she went in there and found that Mr. Williams was "just slumped down in his chair, like this, down and out." She took him by the arm and helped him up. He said that he did not want any dinner, but she insisted that he take some coffee, which he just tasted. He sat down on the bed and took "some aspirins." She took his temperature, and found that it was between 102 and 103 (Tr., pp. 106-107).

Jeff Jordan came into the house at noon for lunch while the two men were still there. He and Mrs. Williams waited a while, and then they had dinner. He was sitting at the table, where he could see Williams, but not the other two men. "They were talking to him about signing some papers. I heard him tell them two or three times 'No'; that he wouldn't do it; that he was not in good shape to sign papers; that he was too sick," was Jordan's testimony as to what he heard.

When Jordan left, about forty minutes after he had arrived, Williams had not given his consent to signing the papers (Tr., p. 117).

On cross-examination Jordan testified:

> "Two or three times I heard something about signing papers, or Mr. Williams saying he didn't want to sign some papers. He was sitting at the table when

I heard that. Mrs. Williams was at the table, too. I suppose that she could have heard anything I heard then" (Tr., p. 119).

So it appears that while Mrs. Williams and Jordan were both at the same table, the only thing [illegible] the whole conversation Jordan heard was about the signing of papers, and Mrs. Williams didn't hear anything about the signing of the papers, though Jordan said that she, being there at the same table with him, could have heard what he heard.

Neither Mrs. Williams nor Jeff Jordan testified that P. H. Williams was out of his mind or conversed irrationally at any time on that same day, to wit, September 18, 1931, or on any other day. Neither testified that he was flighty, or under the influence of a drug, or that he failed to recognize anyone. In fact, neither witness testified that there was anything the matter with Williams' mind either before, during or after the conversation of September 18, 1931.

We glean from other portions of Mrs. Williams' testimony that she and P. H. Williams had been married for about thirty years; that he was working in the oil fields as a day laborer when she married him, and that he was connected with the oil business most of their married life; that, commencing in 1918, he bought machinery and drilled wells either for other people or for himself; that later he drilled for himself a well at Big Lake and made quite a bit of money; that when he sold his lease there he bought the ranch on which they later lived; that he had about 1,000 acres, one half of which was in cultivation and one-half in pasture, on which he had some live stock (Tr., pp. 103, 104).

Mrs. Williams related that her husband had been a sick

mon since the spring of 1931; that he was much worse from the middle of August, when he was kicked in the abdomen and other portions of his body by a bull yearling; that he was bothered with hiccups from then on until he died. She testified that after the injury in the middle of August he was not able actively to pursue his business of farming and ranching (Tr., p. 103). But from other witnesses of the plaintiff we shall see that he continued to give directions to the ranch hands.

Between September 10th and September 16th Williams went through Dr. Nibling's clinic, where X ray pictures were made of him, and where his sputum and urine were examined. His urine showed some sugar. As a result of the X rays and the history given, Dr. Nibling's diagnosis was that Williams had trouble with his liver and gall bladder, either malignant or serious, and that it could have been cirrhosis of the liver or cancer of the liver. Dr. Nibling was also of opinion that Williams was absorbing pus as the result of infection around his gums and teeth, and he advised that the teeth be pulled (Tr., pp. 109 111). Accordingly, Dr. Chase pulled, on the morning of September 17, 1931, fourteen teeth, all of the teeth that Williams had. Dr. Chase found that some of the teeth were abscessed and that there was considerable bone destruction. He administered "anaesthesin" before extracting the teeth, and he observed that Williams had a nervous condition and that his physical condition was not good. He did not testify that he observed that anything was the matter with Williams' mind (Tr., p. 109).

After the teeth were pulled Williams returned to his hotel in San Angelo, but being nervous and restless, he, with his wife, drove back to their farm after sundown (Tr., p. 105).

Mrs. Williams testified that Williams had practically no rest or sleep the night of the 17th; that he was bothered with hiccups all night, and that his teeth bled "terribly" all through the night; that he wouldn't eat that night or the next morning, and that the next morning he had fever between 101 and 102 (Tr., p. 105). She testified that on discovering, after the conversation with George Lee and Humlong, that her husband had fever around 102 or 103, she had her son come for them, and they took Williams back that afternoon to San Angelo, to the hotel. They were unable to get Dr. Nibling, but about 11 o'clock that night (Tr., p. 121) a Dr. McAnulty gave Williams a hypodermic because of the hiccuping. According to Mrs. Williams, his teeth had bled "almost in a stream" the whole time, from the time they had been pulled out. After the hypodermic Williams evidently went to sleep, because he waked up about 3 o'clock on the morning of the 19th with the hiccups and with his teeth bleeding "almost in a stream," and a nurse in the hotel, upon instructions from Dr. Nibling, packed his gums (Tr., p. 107).

Dr. Nibling testified also that on the 20th and 21st of September he saw Williams, and that Williams was nervous and more or less unstrung; that Williams was spitting blood and sitting on the edge of the bed, and had a bucket by the bed where he could expectorate; that Williams wouldn't lie down, and that he only tried to make Williams comfortable with respect to his pain by giving him a hypodermic. Dr. Nibling testified that the condition of Williams' teeth and their extraction was calculated to cause a general upset of Williams' whole mechanism, and a more rapid absorption of pus for the time being. He added that a poisonous condition upsets the mental equilibrium (Tr., pp. 111, 112).

Dr. Nibling was cross examined as to what he found concerning Williams' mental condition on the occasions of his various physical examinations and consultations, and, though he was a witness for the plaintiff, his testimony on cross examination was so frank and important that we now quote it:

"Q. Did you observe anything abnormal about his mind at that time (September 16th)?

A. Not in particular.

Q. Did you observe anything abnormal about his mind the day before that, or the day before that?

A. No, sir. Nothing abnormal that you could put your finger on. **He talked sensibly.**

Q. Do you remember any topic of conversation carried on between the two of you?

A. No, sir; I don't know, other than his ailments his condition.

Q. As far as you knew; he was mentally sound at the time you examined him?

A. At that time; yes, sir.

Q. And at all other times that you examined him?

A. Yes, sir; that is right.

Q. Was he mentally sound on the 20th and 21st of September?

A. He was a sick man, but **he appeared to be in his right mind.**

Q. He was suffering pain, but **you noticed nothing the matter with his mind** on any of those days?

A. **No, sir; I did not**" (Tr., pp. 112, 113).

Williams changed doctors about October 1st and thereafter had Dr. Marberry (Tr., p. 108). Dr. Marberry had no X-rays made, but diagnosed the case as cirrhosis of the liver and abdominal dropsy. He testified that when there is a good deal of infection, and the blood vessels become distended, and the patient has to be tapped in order that

the poison may be drawn off, there is a reaction that enfeebles the whole system, both body and mind. He had to tap Mr. Williams two or three times to draw off the fluid. He testified that his treatment was only a palliative measure, because Williams was in a manner dead during the time he treated him, and Williams died two weeks after the doctor first saw him (not when Williams first went to see the doctor; he walked to the doctor's office (Tr., p. 135)). On cross examination the witness admitted that before the disease reaches such an acute stage that the patient has to be tapped, the patient's condition varies, and that he will have his "ups and downs." Dr. Marberry did not attempt to testify as to what P. H. Williams' mental or physical condition might have been on or about September 18, 1931, and, of course, he did not see him till September 30, or October 1, 1931 (Tr., pp. 113-116).

At his death Williams was only 55 years of age, having been born December 10, 1875 (Tr., p. 162).

The witness Jordan testified to noticing a change in Williams after the bull injury; that Williams didn't seem like himself; that he would be sitting around and studying "a right smart"; that he might take several minutes before answering something said to him by Jordan; that he would tell Jordan to do a piece of work, and later, forgetting the instruction, would want to know why Jordan was doing it; that he would jump on Jordan for not being able to accomplish work that Jordan didn't consider any man could do in the time allotted by Williams. Once Williams and Jordan were counting cattle, and, according to Jordan, Williams forgot to count and took Jordan's count. After the injury Williams didn't do any physical work, though he did help count the cattle, and he con-

tinued to give the men working for him directions now and then, as the previous testimony shows (Tr., pp. 116-118).

H. G. Whittaker, engaged in the employment and feed business at San Angelo, noticed a physical change in Williams "a good while" before the latter's death. He placed the time of change as being eight to ten months before giving his testimony, which was some two to four months after Williams' death (Tr., p. 119).

Mrs. J. P. Webb, who operated the hotel where Mr. and Mrs. Williams stayed, corroborated some of the details of Williams' sickness, particularly on the night of the 18th of September. She said, moreover, that while Williams was sick there at her hotel she once tried to give him some medicine and he refused to take it and spit the medicine right in her face, and that about eight or ten days before his death he grabbed her by the arm and clinched it and stuck his nails into her flesh (Tr., pp. 120-122).

Jim Mabry, another hired hand on the ranch, narrated the details of the injury from the bull and his observation of a change in Williams' condition during the spring and summer of 1931. In counting the stock he noticed that Williams would invariably find some brute missing that actually was not missing—that he always made a mistake in the count; that he would give orders that he deemed impossible of performance; that he would have the middle of an irrigation ditch cleaned, leaving both ends dirty, and then try to force water down through the ditch; that he would come out to the field in his car, and, instead of getting out, as he usually did, he would lean on the steering wheel and apparently go to sleep, or be in a dazed condition, for from ten minutes to half an hour.

After the injury from the bull Williams would walk around where Mabry was working, but he walked with a slight stoop, holding his hands on his stomach. He did not do physical work after the injury, but he continued to give Mabry orders up until the time Mabry left on September 3rd. It had not been Williams' practice to be a regular hand even prior to the injury; he just helped out on special occasions (Tr., pp. 122-124).

George J. Bailey, in the garage business in San Angelo, testified that he noticed a change in Williams in the spring or summer of 1931. He didn't see as much of Williams as he used to. Williams was indebted to him, and one day, some four or six weeks before Williams died, Williams intimated to him that he was contemplating ending it all and letting his insurance pay his bills (Tr., pp. 124, 125).

A. E. Henderson, an oil well driller, testified that he drilled for Williams a well near Barnhart, Texas, to a depth of 8,900 feet; that it was a dry hole, and that it must have cost Williams about $150,000. Several days before the well was abandoned Williams realized it was condemned, and said he believed he would get his gun out and let the insurance company pay his debts. Williams, however, didn't do this. He had the dry hole plugged in September, 1930, and in the fall and winter had Henderson drill two more wells that were dry holes, each at a cost of about $20,000. Henderson noticed a change in Williams' condition after the completion of the deep hole in September, 1930. He noticed that Williams aged fast, was not as patient as formerly, and was more given to finding fault about little things. While the last test he ever put down was being drilled, the countershaft and the engine were out of line. Henderson thought that the

countershaft ought to be moved, but Williams insisted that the engine be moved. Henderson ignored instructions and moved the countershaft and didn't move the engine. A few days later Williams came back, noticed the engine had not been moved, and demanded that it be moved, but finally gave up and drove away. Later he came back, started to move the engine, but finally left it where it was. At the end of February the witness and Williams had an altercation, during which Williams struck the witness in the face. At the time Williams was sitting in his car and the witness thought that Williams either made a motion to get a gun or else to unlatch the car door. In the summer and fall of 1931 the witness saw Williams frequently in San Angelo, and Williams appeared to be much broken in spirit and health; to go bent over and absorbed in himself, without noticing other people much. Williams continued to refuse to speak to the witness. Once, in July or August, the witness saw Williams park his car by a bank downtown and then remain in the car for about forty five minutes, slumped over the wheel, with his arm on it (Tr., pp. 126-129).

Grover C. Parrish testified that he was an oil well driller, and that he noticed a change in Williams after Williams finished the deep well and lost his money; that after that Williams seemed to age and to be "down and out," and not have much to say to anybody (Tr., p. 129).

Joe Stocks, engaged in the sheep business on a nearby ranch, remembered noticing a change in Williams in the summer of 1931. He noticed that Williams was bothered and worried about business, and was irritable. He recalled that Williams had a difficulty with a boy on his place and that the boy struck Williams over the head with an automobile crank. On one occasion, about June

1, 1931, the witness agreed to pasture some cattle for Williams, and then Williams forgot about it until the witness reminded Williams of the agreement thirty or forty days later. Then Williams wanted to exchange some grain for the grass in the pasture, and they agreed on a price and he let the witness have 400 bushels. Later, when they went to settle, Williams had charged the witness for only 200 bushels (Tr., p. 130).

There was no other evidence by anyone who had ever seen Williams bearing on Williams' physical or mental condition at the time he executed the order transferring the dividends to Lee & Lee.

Dr. F. S. White, an alienist who had had several years experience with some state institutions for the insane in Texas, and who had operated a private sanitarium for nervous and mental diseases during a portion of the time, was called to the stand by the plaintiff. He was asked a long hypothetical question, containing a statement of some of the facts heretofore narrated, and set out on pages 132-136 of the transcript. The witness was asked to state whether, in his opinion, P. H. Williams, on September 18, 1931, had "the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction," and the witness was asked to base his answer upon the assumed state of facts.

Over the objections of the defendant the witness answered:

> "I will answer that question assuming all of these statements are true, and, assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper" (Tr., pp. 136-139).

The facts stated in the hypothetical question included none of the conversation that took place between Williams and George Lee and Humlong as narrated by the latter two, or as narrated by Mrs. Williams or Jeff Jordan. In fact, there was no testimony in the record from either Lee or Humlong at the time that the alienist was on the witness stand. The hypothetical statement contained no mention of the fact that on the morning of the conversation Williams was fully dressed and responded to the knock at the door, or that, at the close of the conversation, he voluntarily walked out to the front gate where Lee and Humlong's car was parked and engaged in pleasantries about cattle and other topics before returning to the house. It included a reference to the testimony of Williams' physician, brought out on cross-examination, to the effect that he did not observe unsoundness of mind at some period not stated, but contained nothing to show that such physician, just two days before and just two days after the act of signing, found nothing the matter with Williams' mind when he examined Williams, and that Williams talked sensibly when he was in the physician's presence.

On cross-examination Dr. White, in recounting the facts that he assumed and relied on, recalled testimony to the effect that, during the conversation with Lee and Humlong, Williams said he was a sick man and not in a condition to attend to business, and the alienist said that such testimony showed that Williams "realized his condition." The witness also added that an important factor upon which he based his answer that, in his judgment, Williams was not in a condition to know the nature and effect of the signing of the instrument, was the fact that Williams had been bleeding "for two or three days—something like that—and rather extensively." There was

no statement in the hypothetical question, or in the evidence, that warranted the doctor's assumption of extensive bleeding for two or three days prior to Williams' act of signing the instrument (Tr., pp. 111-113). Williams' teeth were extracted only twenty-four hours before the act of signing, and at no time prior to the act of signing, and not until about eleven or fifteen hours after such signing, did Williams' bleeding gums require or receive medical treatment. He was taken to San Angelo on the afternoon of the 18th, because Mrs. Williams got scared on account of the rise of his temperature to 100 and a fraction. Even then they did not start for San Angelo until it got cooler, and after they arrived they did not immediately summon a physician, but about 11 o'clock that night a physician was called to give Williams a hypodermic, according to Mrs. Williams, not because he was bleeding, but because "Mr. Williams was breathing so terribly" (Tr., p. 107).

Argument

There being a presumption of mental capacity, the burden was on the plaintiff to establish the lack of requisite mental capacity by showing that P. H. Williams, at the time of the execution of the assignment, did not understand the nature and effect of such act.

> Wigmore on Contracts, Vol. 1, Sec. 236, p. 500;
> Parker v. Marco, 76 Fed. 310;
> Richardson v. Travelers Ins. Co., Me., 89 At. 1009;
> Shardlow v. Miller (N. J. Ch. Ct.), 63 Atl. 472;
> Aldrich v. Bailey (N. Y. Ct. App.), 30 N. E. 264.

Though petitioner and respondent seem to be agreed upon the legal standard of requisite mental capacity with

reference to contractual relations, such standard may be restated in the language of Professor Williston:

> "The question, therefore, should depend, and, according to the great weight of modern authority, does depend, upon whether the alleged lunatic had **sufficient reason to enable him to understand the nature and effect of the act in dispute.** It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. **Mere weakness of mind or a condition approaching imbecility is not sufficient** to constitute what the law regards as insanity."

The rule by which the action of a trial court should be guided in determining whether there was sufficient evidence to go to the jury on an issue, as promulgated by the Supreme Court of the United States, is as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, 'that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'" (Guiterry v. Cooley, 281 U. S. 90, 94).

The burden cannot be sustained merely by arousing a suspicion as to the issue and by leaving the whole question "in the realm of conjecture, possibility or surmise." (Wallace v. Standard Accident Insurance Co. [C. C. A., 6th Cir.], 63 Fed. [2d] 211).

The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental

condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later resulted in his death, cannot be denied. As a result of financial reverses and sickness he was despondent. On two occasions he had contemplated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent mindedness and forgetfulness also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances and exhibited less interest in them. He had become irritable and cross on occasions.

Certainly the foregoing does not constitute any evidence that Williams did not understand the nature and effect of the signing of the instrument whereby he transferred the dividends due him to Lee & Lee. They are merely circumstances that may be taken into consideration in weighing evidence of a more cogent and direct nature as to a lack of requisite mental capacity at the time of execution.

The fact that Williams had about three degrees of fever on the morning of the 18th of September, and that his gums undoubtedly did bleed some during the twenty four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition. But such evidence does not show that he was flighty, mentally exhausted, stupefied, unconscious or otherwise incapable of reasoning on the morning of the 18th. Mahatma Gandhi, as pointed out by the trial judge in his charge, is a striking illustration of a man intensely weak physically and yet intensely strong intellectually. Even when Gandhi fasted in jail for days, he had complete command of his mental powers.

The affirmative facts as to what was said and done on the morning of the 18th belie the fanciful claim that Williams was so weakened physically that he did not have command of his mental faculties. To whatever extent he had bled, it was not sufficient to require before late that night or the early morning of the next day the summoning of medical aid. As already pointed out, he had medical treatment on the night of the 18th, possibly eleven or twelve hours after the execution of the instrument, but, according to Mrs. Williams, such treatment was a hypodermic administered for the purpose of relieving his pain from hiccuping. The uncontradicted testimony of disinterested witnesses shows that he was not weakened to such an extent that he had to stay in bed on the morning of the 18th. He was up, dressed, and he answered the knock at the door. He was not in bed during the conversation which Mrs. Williams would have us believe lasted for two hours. During such time he was in the living room in a chair, and was moving around to some extent. He voluntarily walked to the front gate to bid goodbye to his visitors whom he came to treat as guests. He was capable, therefore, of reasonable physical exertion during the morning, and at and after the time he signed the instrument. He was also capable of reasoning, as is shown by the details of the conversation he carried on. According to Mrs. Williams and Jeff Jordan, Williams said that he was sick and wanted to put off the business conversation, telling his visitors that he would be in San Angelo within a few days and would then attend to the matter. This, in itself, shows the exercise of mental power. He had been approached on a subject that he might be loath to talk about, even if well. His statement shows his engagement in rational, intelligent and connected conversation. The testimony of Hamlong and

George Lee brings out that Williams talked to them of his herd of cattle, mentioning where he had gotten them and how proud he was of them. He also talked to them about the oats in his bins, and added that he was holding them for a better price. The carrying on of such conversation by Williams showed that he had power to reason about business matters, and that he used judgment. Williams had first told George Lee that he was peeved at the insurance company, that he did not want to transfer the dividends to Lee & Lee, that he wanted to keep the dividends himself. This showed not only that he was mentally alert and capable of coherent thought, but that he had understanding of the transaction actually involved. In these respects George Lee and Humlong were wholly uncontradicted.

The fact that Mrs. Williams knew that the two strangers called to discuss business with her husband; that her husband was discussing business with them; that she did not enter the room to inform the strangers that her husband was mentally incompetent and unable to discuss business with them; that she did not enter the room to interfere with her husband or to dissuade him from transacting business with the strangers; that she did not enter the room to lend him any assistance in the transaction of business with the strangers, and that she did not testify that at any time she observed anything unusual in the mental conduct of her husband, is proof positive of the fanciful nature of the claim placed before Court and jury in this case.

The testimony of Dr. Nibling, the plaintiff's own witness and Williams' own physician, shows what Williams' physical and mental conditions were two days before and two days after the act of signing. From the 10th to the 16th Dr. Nibling had given Williams a thorough examination, and on the 16th he made a diagnosis. On all of

those days Williams "talked sensibly" in the presence of the doctor. The first medical treatment for bleeding of the gums came quite a few hours after the act of signing, either late on the night of the 18th, or about 3 o'clock in the morning of the 19th. There is further evidence that Williams was troubled with bleeding and pain on the 19th, 20th and 21st, and that Dr. Nibling went to see him on the 20th and 21st, and that Williams was still "spitting blood and sitting on the edge of the bed, and had a bucket by the side of the bed where he could expectorate." He found Williams "nervous and more or less unstrung" and "holding ice in his mouth, trying to stop the hemorrhage." Even at the end of forty-eight hours and seventy-two hours after the signing of the instrument, Williams was not so exhausted from the continued bleeding and the ravages of pain and disease in the interval but that he had retained his mental faculties. According to his own physician, Williams still appeared on the 20th and 21st "to be in his right mind," and such witness for the plaintiff noticed on such dates "nothing the matter with his mind."

It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument.

There is no testimony from any one of the plaintiff's witnesses that knew Williams—not even Mrs. Williams or Jeff Jordan, the hired hand—to the effect or even indicating that on the 18th, or for that matter on any other day, that Williams was unconscious from physical exhaustion, in a stupor, out of his head or flighty. There was no testimony from any of such witnesses that on the 18th Williams failed to recognize anyone, or that he could not or did not engage in rational, connected conversation.

The evidence of the witnesses who had known Williams,

on the other hand, showed affirmatively that on the morning of the 18th, when the instrument was signed, Williams was up, dressed, walking around, capable of reasonable physical exertion, and that he was clear-headed, recognized those with whom he came in contact and was able to and did reason and carry on a coherent, intelligent conversation about business and other matters.

Certainly, from so much of the evidence, it could not be reasonably inferred that Williams was incapable of understanding the nature and effect of the simple transaction of transferring the dividends earned on his policies to Lee & Lee to pay a debt that he admittedly owed them. Not even a suspicion of legal mental incompetency at the time is raised.

In re Little's Estate (Dist. Ct. of App., Cal.), 189 Pac. 818;
In re Campbell's Estate (Dist. Ct. of App., Cal.), 189 Pac. 812;
In re Shields' Estate (Sup. Ct. of Iowa), 200 N. W. 219;
In re Richardson's Will (Sup. Ct. of Iowa), 202 N. W. 114;
Richardson v. Travelers Ins. Co. (Me.), 82 Atl. 1005;
Sayre v. Trustees of Princeton University (Sup. Ct. of Mo.), 90 S. W. 787;
In re Laflin's Estate (Sup. Ct. of Neb.), 187 N. W. 885;
Johnson v. Talbot (Mass.), 150 N. E. 900;
Taylor v. Creeley (Mass.), 152 N. E. 3.

In the case of In re Little's Estate the evidence submitted by the contestant may be summed up as follows: The testator, a man of some education, at one time cashier in a bank and later a farmer, succeeded well enough to accumulate a comfortable fortune, but he suddenly met

with a series and variety of reverses, which so shocked his nervous organization as to have worked changes in his physical and mental characteristics. Death claimed his wife after they had only been married a little over a year. Shortly thereafter the stable located on his farm was destroyed by fire. This misfortune was soon followed by the theft of an automobile owned by him. Following these troubles he appeared to grow discouraged and disappointed, and applied himself more liberally to the consumption of intoxicating liquors than he had ever before been accustomed to indulge in theto. He lost flesh and displayed mental peculiarities not theretofore noticed by anyone. According to some of the witnesses he acted irrationally at times. On one occasion, when dwelling on his misfortunes, he wrung his hands and talked to himself, and on another occasion, while under a great nervous strain, he exclaimed that all his misfortunes would drive him crazy. On another occasion he complained that an engine used on the farm was out of order and would not perform, but a machinist found it intact in all respects. Some witnesses for the proponents testified that while the testator on occasions acted very peculiarly and like one laboring under a severe nervous and mental strain, he did not appear to be irrational. There was no positive testimony that the testator was under the influence of intoxicating liquor at the time he wrote his will in longhand. The testator committed suicide about a month after he wrote the will. The trial court took the case from the jury and entered an order admitting the will to probate. On appeal such action was upheld on the ground that the contestants' evidence was not sufficient to make out a case to go to the jury on the issue of lack of testamentary capacity.

In the case of In re Campbell's Estate the evidence, as

characterized by the Court, showed "that the deceased had been for many years a heavy drinker of intoxicating liquors, and during the latter years of his life drank liquors to excess; that he was a very old man when he made his will, and that he was feeble physically; that on occasions he was so ill as to be compelled to take to his bed, the cause of such illness, it is to be inferred from the evidence, being the excessive use of alcoholic liquors; that he could not readily remember old acquaintances when their names were mentioned to him or when they met and greeted him * * *; that he often spoke of the Bible and would ask his friends if they thought he was saved, and would cry very often." The action of the trial court in taking the case from the jury and in awarding judgment against the contestants of the will was upheld on the ground that the evidence was insufficient to require the submission to the jury of the issue of testamentary capacity.

In the case of In re Shields' Estate the testator was a farmer, dying at the age of 71 and leaving surviving him a daughter and a son. The will was executed about two and one-half months prior to his death. There was evidence that the testator had had a spell of sickness and had been confined in a hospital, and that he had arteriosclerosis. Other evidence was to the effect that the testator was at times irritable, childish in some ways and forgetful. A physician called by the contestant testified that the testator talked rationally and sensibly, and that he did not notice anything out of the normal in his mental state when he examined him some time between the execution of the will and the testator's death, three months later. The trial court directed a verdict for the proponents of the will and the contestants appealed, but the judgment in favor of the proponents was upheld, the Court saying:

"Time and again this Court has declared that mere old age or some deterioration in physical or mental powers, or peevishness, childishness and eccentricities are not alone sufficient to carry to the jury the question of mental unsoundness on the part of a testator."

In the case of In re Richardson's Will the testatrix, at the age of 78, executed a will while she was in bed sick with pneumonia, of which she died four days later. The will was executed at about 7 o'clock at night, and on the morning of the same day a physician was called and found her suffering a great deal with pain in her chest, labored respiration and some temperature. He saw her again in the afternoon, found the trouble localized in the right side of the chest and diagnosed it as pneumonia. He found an irregular heart action, which he designated as a partial heart block. He testified that pneumonia caused poisons in the system until they affected mentality, and that heart block impairs the circulation through the brain and the entire system and could affect the mentality to a certain degree. Within a few minutes after the will was executed the same physician saw the testatrix again. He testified that the testatrix would have to be asked a question two or three times; that he did not know whether she was in a state of losing her reason entirely. He added: "I would say, under those circumstances, she was of unsound mind. She was in a certain stupor or mental apathy." Two daughters who saw the testatrix the next morning said that their mother's eyes were glassy; that she was weak and pale and she breathed hard, and that she acted as though she were really too sick to know who they were, or what was going on in the room. The trial court submitted the case to the jury, and the jury returned a verdict for the contestant and found that the testatrix did not possess tes-

tamentary capacity. But, on appeal, it was held that the evidence was insufficient to sustain the finding that the testatrix was of unsound mind at the time the will was executed. The Court said:

> "She was physically, not mentally, ill. Any mental disturbance or impairment from which she suffered was the result of her physical condition. It is not doubted that, as a result of physical ailments, a person may, in the progress of the disease or by reason of weakness, become mentally incompetent, or that this may occur in the case of one suffering from the ills that afflicted the testatrix. **But the evidence wholly fails to show that such a stage had been reached in the course of her illness at the time the will was executed.** She was suffering and was weak; but the only indication of mental disturbance noticed by Dr. Hoefer was that it was necessary at times to repeat questions to her. His statement that she was in a sense of unsound mind clearly had reference to that situation as being a departure from the normal."

The other cases cited are of similar import.

If it be true then that the evidence adduced, exclusive of the testimony of the alienist, Dr. White, was insufficient to carry the case to the jury on any charge as to the issue of lack of mental competency, did the expert opinion of the alienist, who, without ever having seen Williams, gave an answer to a hypothetical question based upon a part of such evidence, and omitting much undisputed material evidence of an adverse nature, require that the case go to the jury on a charge with reference to such issue? The solution of the question depends in part upon the nature of such testimony, which is analyzed by Thayer in the following language:

"They 'judge' the phenomena, the appearances or facts which are presented to them, and testify to that which in truth these signify or really are; they estimate qualities and values. We say that they testify to opinion. In truth, they are **'judging'** something and testify to their conclusion upon a matter of fact * * *; they are simply to aid the final judges of fact, and not to bind them" (Thayer, "A Preliminary Treatise on Evidence at the Common Law," p. 196).

Time and again, where the alienist has not seen the person whose mental capacity is in issue, and where he answers only a hypothetical question which a court has felt did not, as a matter of law, contain any reasonable basis for the expression of an opinion against mental competency, or which did not contain substantially all of the essential facts proven at the trial by the undisputed evidence, the Court has not hesitated to take the case from the jury notwithstanding such expert opinion.

In re Little's Estate (Dt. Ct. App., Cal.), 189 Pac. 818;
In re Richardson's Will (Iowa), 202 N. W. 114;
Sayre v. Trustees of Princeton University (Mo.), 90 S. W. 787;
Taylor v. Creeley (Mass.), 152 N. E. 3.

With reference to the case of In re Little's Estate, we have already shown the essential facts testified to by witnesses who had known and observed the testator. They bear in many respects a striking similarity to the facts relied upon by the plaintiff in this case. In addition, the contestant produced an alienist who was asked a hypothetical question embodying the facts that we have detailed, and he said that in his opinion, at the time the will was written, the testator was insane. Notwithstand-

ing such opinion the Court refused to let the case go to the jury on the issue of mental competency, and such action was upheld on appeal. With reference to the expert testimony the Court said:

> "* * * but as to this character of testimony the Supreme Court, in Estate of Dolbeer, 149 Cal. 227, 243, 86 Pac. 695, 702 (9 Ann. Cas. 795), has justly declared: 'The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person or who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory.'"

In the case of In Re Richardson's Will, likewise a case where the appellate court considered that the evidence was insufficient to go to the jury, notwithstanding the opinions of expert witnesses given in answer to a hypothetical question, the Court characterized the testimony of expert witnesses so given as "a class of testimony generally recognized as weak" and "in this case of little or no value in determining the mental condition of the testatrix at the time the will was executed."

In the case of Sayre v. Trustees of Princeton University, wherein the trial court let the case go to the jury and the jury returned a verdict that the paper writing propounded was not the last will and testament of the testator because of lack of testamentary capacity, and wherein the Appellate Court reversed the case with directions to enter a judgment admitting the will to probate and holding that the evidence was wholly insufficient to go to the jury on any question of mental incompetency, the Court said, with reference to the testimony of several alienists given in answer to a long hypothetical question:

"We are not bound to accept an opinion based upon facts which the law will not, and does not, recognize as showing a want of capacity to make a will."

In Taylor v. Creeley, the Appellate Court was of the opinion that all of the evidence, notwithstanding the adverse testimony of experts, was insufficient to go to the jury on any issue of mental incompetency.

We have already shown that in our case the cross-examination brought out that the alienist, in giving his answer to the long hypothetical question propounded to him, went outside the facts stated to him, and from his own imperfect memory of what he had heard in the court room from witnesses, assumed as the principal fact upon which his opinion was based that Williams, prior to the act of signing, had been bleeding "for **two** or **three** days, something like that, and rather extensively." His assumption was unfounded, because of the uncontradicted evidence that, prior to the act of signing, Williams' gums had been bleeding approximately twenty-four hours. It is implied that the alienist's opinion was based upon assumption of such complete physical exhaustion as to make reasonable an inference of mental collapse. Such assumption and such inference are both refuted by facts not put to the witness in the question propounded—facts that at, and for at least an hour or so prior to the act of signing, Williams was up, dressed and responded to the knock at the door when George Lee and Humleng arrived, and that while they were there he engaged in intelligent, coherent conversation about business and other matters, and that when Lee and Humlong left he voluntarily walked with them to the front gate and engaged in more rational conversation—facts which show conclusively that at the time of signing Williams was not only capable of reasonable

physical exertion, but also in possession of his mental faculties and power of reasoning.

We submit that there was no evidence from which it may be reasonably inferred that Williams appeared to be mentally ill on the morning of September the 18th, much less that he was so mentally ill on such morning that he could not have understood the transaction of assigning the dividends to Lee & Lee.

We submit, therefore, that none of the evidence was sufficient to take the case to the jury on the issue of lack of mental competency. This being so, it follows that the assignment of the dividend declared on the policy that lapsed was valid, that pursuant to such assignment the dividend was paid to the insured (or his order) in cash, which was one of the options afforded by the policy, and that the dividend was thus validly applied, and cannot be used again for any other purpose. It follows, for such reason alone, if for no other, the trial court erred in not instructing the jury, in accordance with the defendant's request, to return a verdict for the defendant.

POINT 2.

The so-called fraud in the procurement of the dividend order, now claimed by the petitioner, was not pleaded, and the pretended claim of fraud, as pleaded, or as now claimed, was not substantiated by evidence sufficient to raise any issue of fraud for submission to the jury; the Court's charge ignored any issue of fraud, and the petitioner made no objection to such charge, and requested no charge on any issue of fraud, but abandoned in the trial court all claim of fraud.

The pretense of fraud, made in the petitioner's supplemental brief under point 2, and of mistake under point 3,

was not passed upon by the Circuit Court of Appeals (nor were such questions raised in the petition for writ of certiorari). Though we do not anticipate that the Court will consider the questions now, we shall reply to the petitioner's contentions set forth in her supplemental brief.

On page 5 of the brief the petitioner erroneously referred to the "respondent's assignments challenging the sufficiency of the evidence to show mental incapacity, **fraud or mistake.**" On page 10 of the petition for writ of certiorari the petitioner again erroneously referred to the respondent's assignments of error challenging the sufficiency of the evidence to show fraud or mistake. The assignments of error are set out in the record on pages 195-212 of the brief. None of them relates to fraud or mistake, or raises any issue with reference to either.

The burden of petitioner's point 2 is that George T. Lee, attorney for Lee & Lee, in an effort to collect for Lee & Lee a debt due personally from Williams to Lee & Lee, told Williams, in effect, that the insurance was at an end, and he wanted Williams to use the dividends to pay an honest debt to Lee & Lee, that Williams believed and relied on such opinion, and that the insurance company realized, or should have realized, that such expression was made and resulted in Williams' execution of the dividend order. No misrepresentation of a fact is charged.

Nowhere in the pleadings, however, is there any claim that George Lee made any verbal misrepresentation of any character to Williams, or even passed on to him an erroneous opinion or belief, as to Williams' rights under the policy. The only claims of fraud set forth in the petitioner's pleading are contained in paragraphs IV and V of the petitioner's first supplemental petition (Tr., pp. 57-

59). In paragraph IV it is alleged that the dividend order signed by Williams, and addressed to the insurance company, contained the recital that the policy in suit had lapsed along with other policies carried by Williams, and that thereby Williams was led to believe that he no longer had any insurance. In paragraph V it was claimed that one Charles A. Poteet, the company's agent at San Angelo, had made a misrepresentation to Williams as to his rights under the policy. No other claims of fraud in the procurement of the dividend order were alleged, and there is nothing in evidence whatsoever concerning the allegations in paragraph V. Likewise, there is nothing in the evidence as to what Williams believed and relied upon.

Because all pretended evidence of fraud was without probative force, the trial court submitted to the jury in its charge nothing whatsoever concerning any issue of fraud. Because this was true, the petitioner did not make any objection to the Court's charge as made, or to the Court's failure to charge as to such issue, and requested no charge on such issue. At the trial, the petitioner abandoned all claim of fraud.

The basis of the so called fraud, claimed on appeal for the first time, is that George T. Lee, in endeavoring to get Williams to pay a personal debt to Lee & Lee by assigning a written order on the insurance company directing it to pay the dividend on this and other policies to Lee & Lee, told Williams that his policies had "lapsed," and that "the default in the payment of the note to Lee & Lee constituted a cause 'of the lapsed policies'." That George Lee was correct in saying that the policies had lapsed, no one can truthfully deny. The testimony quoted from the record does not show that George Lee represented the default in the payment of the note as the real cause of the lapse,

but indicates, rather, his point of view was that the policies would have lapsed in 1930 if Lee & Lee had not come to Williams' rescue and personally advanced to Williams the funds needed to pay the 1931 premiums to the insurance company. George Lee at least made it plain to Williams that the real cause of lapse was Williams' failure to pay the premiums of June 10, 1931 (Tr., p. 153). If the policies lapsed, as indisputably they did, the reason assigned for the lapse seems to be legally immaterial.

George Lee informed Williams, at the time of the transaction complained of, that he did not represent the insurance company, could not bind the insurance company, and was there solely on the private and personal business of Lee & Lee (Tr., pp. 150, 157).

Under such circumstances the insurance company cannot be held to have participated in, or to be responsible for, anything that George Lee told Williams. As George Lee was not acting for, and did not purport to act for, the insurance company, it cannot be said to have adopted the transaction as its own. There was no occasion for adoption. The insurance company merely acted under the order received by it from Williams in paying the dividend, and had nothing to do with the procurement of the order.

The situation here is not like the situation where an agent was discharging business of his principal while furthering some secret purpose of his own, as in Gleason v. Seaboard Co., cited by petitioner, or where the agent purported to act for his principal without authority, and the principal adopted the transaction as his own, as in Henderson v. San Antonio M. G. Ry. Co., cited by the petitioner. The situation here is more nearly like that of Teagarden v. Godley Lumber Co., 105 Tex. 616, 154 S. W.

973. As, in that case, it was held that the knowledge of an agent acquired while purchasing property for himself and others cannot be imputed to his principal when the latter acquires the property in a subsequent deal, a fortiori, the knowledge of George Lee—never the agent of the insurance company—acquired in obtaining the dividend order, cannot be imputed to the insurance company when it subsequently received the dividend order and carried out the direction addressed to it by the policyholder.

In contradiction of the facts, and for the sake of argument only, let us assume that George Lee had misrepresented to the policyholder that his insurance had ceased, but, as a matter of law, it had not, and that in some way the insurance company was responsible for such expression. An honest misrepresentation by the insurance company to the policyholder of the latter's legal rights under the contract, long after the contract had been made, and when the insurance company was claiming that it was no longer insurer of the policyholder's life, would not be ground for rescinding the transaction whereby the policyholder directed payment of the dividends on his policies in cash and such payment was made (Kincaid v. New York Life Ins. Co., 5th C. C. A., 66 Fed. [2d] 268). In that case the company claimed that the quarterly premium of June, 1929, was not paid, and advised the policyholder of the lapse of his policy, and a reinstatement was put through. It subsequently developed that the company was holding dividends declared and credited to the policy in June, 1928, and 1929, more than sufficient to pay the premium, and that under the provisions of the policy the premium had in fact been so paid. In March, 1931, the company claimed that the reinstatement had been obtained by false statements, elected to rescind it, and mailed the policyholder

a check for the premiums and interest paid in making the reinstatement and since then, and stated that the policy stood lapsed as of June, 1929. In June, 1931, the policyholder cashed the check. After the death of the policyholder it was claimed in a suit against the company that the acceptance of the money in June, 1931, was induced by the company's false assertion in August, 1929, repeated in March, 1931, that the policy had lapsed and required reinstatement. As to this claim the Court held:

> "In March, 1931, whatever confidence ordinarily exists between insurer and the insured was broken. The company was then claiming a dissolution of the relationship and was dealing at arm's length with Kincaid. He labored under no legal disability or handicap. He fully understood the facts and must be held chargeable with knowledge of the provisions of the policy, and his rights under them. If he did not understand them, he ought to have gotten advice."

POINT 3.

The policyholder made no mistake as to his legal rights to the contract of insurance, but even if a mistake had been made, the insurance company would not have been responsible for such mistake, and the mistake of law would not have been a ground for setting aside the payment of the dividends in cash.

This point adds nothing to the previous point made by the petitioner, but is a part thereof.

In the first part of our brief we have stated our conception of the rights of the parties under the contract. If we are correct, no mistake was made. In our reply to the petitioner's second point, we have shown that not only was the dividend order not improperly procured, but also

that the insurance company was not responsible for anything said in procurement thereof by a stranger to the insurance company in the transaction of the personal and private business of a third person.

The case of Kincaid v. New York Life Ins. Co., cited by us under our reply to point 2, shows that Williams must be held accountable as if he knew his rights under the contract, and that if he had made a mistake as to his rights thereunder, he would have acted at his peril, and such mistake of law would have been legally immaterial.

There is no evidence in the record as to what knowledge Williams had concerning his rights under the policy. There is no evidence that he made a mistake, or that the insurance company induced any mistake. Because the pretended evidence of mistake was without probative force, the trial court submitted to the jury in its charge nothing whatsoever concerning any issue of mistake. Because this was true, the petitioner did not make any objection to the Court's charge as made, or to the Court's failure to charge as to such issue, and requested no charge on such issue. At the trial the petitioner abandoned all claim of mistake as well as of fraud.

CONCLUSION.

For the reasons hereinbefore given, the respondent, The Union Central Life Insurance Company, prays that the judgment of the Circuit Court of Appeals reversing the judgment of the trial court be affirmed.

Respectfully submitted,

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